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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented

Tenn. Code Ann. § 57-3-202(e) provides that distilled spirits and wines cannot be sold to Tennessee wholesalers unless the supplier has affirmed that the price to them is no higher than that being charged contemporaneously to any wholesaler in any other state. Tennessee has no price-posting requirement, and suppliers are therefore free to change their prices to Tennessee wholesalers at any time without regulatory approval, prior notice and waiting period, or compliance with any other prerequisite imposed by the State.

Does the Tennessee lowest-price affirmation statute, on its face and as demonstrated by the evidence of record, violate the Commerce Clause by effecting (1) direct, extra-territorial regulation of prices in other states and (2) simple economic protectionism, because the practical effect of the contemporaneous affirmation requirement is inevitably to restrict the freedom of suppliers to change their prices in other states in response to differing market conditions and competitive forces and to deprive out-of-state wholesalers and consumers of the lower prices otherwise possible in the competitive circumstances of their particular markets? If so, a subsidiary issue is whether the Twenty-first Amendment saves such regulation.

List of Parties and Rule 28.1 List

The parties to the proceedings below were the petitioner, Brown-Forman Corporation, which was the plaintiff in the District Court, and the Tennessee Alcoholic Beverage Commission, its Director, Elyon H. Davis, its members, Martha Warfield, Carl A. Jones and Ellida Fry, and the Attorney General of the State of Tennessee, the defendants. The plaintiff and the defendants were, respectively, the appellee and appellants before the Court of Appeals for the Sixth Circuit.

The District Court granted the motion to intervene of the Licensed Beverage Wholesalers of Tennessee, a trade association composed of Tennessee wholesalers. It was an intervenor-appellant before the Court of Appeals.

The Wine and Spirits Wholesalers of America, Inc., a trade association, submitted a brief to the Court of Appeals as *amicus curiae* in support of the appellants there.

Petitioner, Brown-Forman Corporation, has no parent companies, subsidiaries (except wholly- owned subsidiaries) or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Brown-Forman Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United State Court of Appeals for the Sixth Circuit, entered in the above-entitled action on November 4, 1988.

Opinions Below

The opinion of the Court of Appeals for the Sixth Circuit is reported at 860 F.2d 1354 and appears in the appendix hereto, p. 1a, *infra*.

The memorandum decision of the United States District Court for the Middle District of Tennessee, Nashville Division (Nixon, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 21a, *infra*.

Jurisdiction

Invoking the jurisdiction of the District Court under 28 U.S.C. § 1331 because of the federal constitutional issue raised, the petitioner brought this declaratory judgment action in the Middle District of Tennessee to challenge the constitutionality of Tennessee's statute which conditions the sale of spirits and wines to wholesalers in that state upon a lowest-price affirmation requirement. Following trial, the District Court found the requirement to be in violation of the Commerce Clause and permanently enjoined enforcement of the offending statute.

On respondents' appeal, the Sixth Circuit, on November 4, 1988, reversed the judgment of the trial court and remanded with instructions to dissolve the injunction and dismiss the complaint. (App., p. 20a) Rehearing was not sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statute

U.S. Const., art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States. . . .

U.S. Const., amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Tenn. Code Ann. § 57-3-202(e) appears in its entirety in the appendix, p. 33a. The central provisions are as follows:

> (1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;
>
> (2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.

Statement of the Case

Petitioner ("Brown-Forman") produces and imports distilled spirits and wines. It sells its products in interstate commerce to independent wholesalers in more than 30 states, including Tennessee.[1]

1. Brown-Forman also sells its brands to the so-called "control states" (or "monopoly states"), where the state itself conducts the business in wine and/or spirits by performing the wholesale or retail functions.

Since 1975, Tenn. Code Ann. § 57-3-202(e) has imposed an affirmation requirement upon Brown-Forman and other suppliers as a condition to their selling their brands to Tennessee wholesalers. Before offering any brand to wholesalers there, the supplier must file with the respondent Tennessee Alcoholic Beverage Commission (the "ABC") an "affirmation of corporate policy." § 57-3-202(e), subsection 1. That affirmation must certify that the supplier will "not willfully sell or offer for sale any . . . particular brand, proof or size, in Tennessee at a price higher than the price" to wholesalers in any other state. *Id.*, subsection 2. Failure to file, the making of a false affirmation, or willful violation of the affirmation pledge is punishable as a misdemeanor and refusal, revocation or suspension of the supplier's license for not less than a year. *Id.*, subsections (4) and (5).

Following this Court's decision in *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986), Brown-Forman advised the ABC that it was withdrawing its affirmation. The Tennessee Attorney General thereafter rendered an opinion in which he found that the Tennessee affirmation statute is distinguishable from New York's "prospective" statute struck down in *Brown-Forman* and is not in violation of the Commerce Clause. His opinion, in salient part, concluded:

> Tennessee's affirmation statute is neither prospective nor retrospective in its operation. Rather, Tennessee's law refers to a "contemporaneous" time period as the reference point for the lowest or affirmed price. A contemporaneous affirmation requirement means that a supplier must affirm that its prices are no higher than its prices elsewhere at the very time of sale to a Ten-

> nessee wholesaler. It is our opinion that a contemporaneous statute does not impose the impermissible extraterritorial effects on interstate commerce that seem inherent in a prospective statute. Unlike the New York law condemned in *Brown-Forman*, under a contemporaneous affirmation law like Tennessee's, a supplier, after making its sale to a Tennessee wholesaler, is free to alter its pricing policies, as it chooses, in wholesale liquor transactions in other states. (Rec. 38-39)[2]

The State Attorney General also noted that in *Brown-Forman* this Court "specifically did not overrule its earlier decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966);" he concluded that, "by [thus] failing to address the issue of the validity of affirmation statutes that do not operate prospectively, the Court has left this question open." (Rec. 38)

Following that opinion, Brown-Forman, seeking to enjoin enforcement of the affirmation requirement as a violation of the Commerce Clause, brought this declaratory judgment action against the ABC. At the trial, the ABC Director testified that more than half of Tennessee's residents live in counties bordering other states and that its affirmation requirement attempts to prevent Tennessee consumers from crossing state lines to buy liquor. (Rec. 231)

Brown-Forman presented uncontradicted evidence of substantial variations in the competitive conditions encountered from market to market among the various states, the disparate success of its brands in those markets, and the resulting need to charge lower prices for particular

2. "Rec. —" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

brands in various markets in order to achieve sales. Based upon its long-time compliance with the affirmation statutes of more than twenty states prior to the Court's decision in *Brown-Forman* and its consequent inability to price in response to the competitive forces unique to different markets, Brown-Forman's proof showed how affirmation inhibits such incentive pricing. For example, if a supplier raises its price in Tennessee, it has to increase any lower price to that level in every other state. Furthermore, if the price to Tennessee wholesalers is higher at any time, it must be reduced to the lowest price dictated by the competitive circumstances in any out-of-state market. That added-cost or loss-of-revenue deterrent to pricing in response to the differing competitive circumstances of each particular market is compounded by the number of states which impose affirmation, because the lowest price must be matched in all of them. As testified by one of Brown-Forman's sales executives, the affirmation requirements of Tennessee and other states keep the out-of-state prices of brands higher than those the differing competitive forces of each market would otherwise produce. (Rec. 101-106, 109-114, 116-120, 143-147, 181)

Because the ABC had neither instituted any enforcement proceedings nor promulgated any rules or regulations, the trial court concentrated on whether the Tennessee affirmation law "on its face" violates the Commerce Clause. The court held that the statute "is facially unconstitutional because of its effect on interstate commerce." (App., p. 26a)

The District Court recognized that the Tennessee affirmation requirement "is neither prospective nor retrospective, but 'contemporaneous' in that a supplier must affirm

that its prices are no higher than its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler." (App., p. 29a) As the Tennessee Attorney General had, the trial judge also noted that in *Brown-Forman* this Court had not overruled its decision in *Seagram* sustaining the facial constitutionality of a retrospective statute and had ruled explicitly only with respect to prospective affirmation statutes. He nevertheless concluded that it was "theoretical conjecturing" to urge, as the ABC did, that "once a supplier has made its sale to a Tennessee wholesaler, it is free to alter its pricing policies in wholesale liquor transactions in other states as it chooses." (*Id.*)

Because *Brown-Forman* established that "the 'practical effect' of the questioned statute is the touchstone for determining its validity," the trial judge found as follows:

> What is clear to this Court is that the "practical effect" of Tennessee's affirmation statute, as currently set forth, is to control the prices of Brown-Forman products in other states. It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market and the availability of [Brown-Forman's] 77-17 promotional allowance program or of quantity discounts fails to offset the extra-territorial effect of Tennessee's projected legislation.[3]

(App., p. 30a)

The District Court also rejected the contention that the Tennessee affirmation statute was a valid exercise of the

3. For a description of Brown-Forman's 77-17 lump sum, unconditional promotional allowance program, see *Brown-Forman*, 476 U.S. at 576-577.

state's Twenty-first Amendment powers. The court held that the Amendment empowers Tennessee to control sales only in Tennessee, not in other states, and, further, citing *Bacchus Imports, Ltd.* v. *Dias,* 468 U.S. 263 (1984), that "state laws that constitute mere economic protectionism are not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic of alcoholic beverages." (App., pp. 30a-31a)

The Court of Appeals did not question any of the trial court's findings of fact as "clearly erroneous." To the contrary, the Court of Appeals concluded that the evidence showed that in transactions outside Tennessee the affirmation requirement increases supplier prices and the costs to out-of-state wholesalers:

> The record in the case at bar confirms that the natural tendency of the Tennessee staute is to increase costs outside of Tennessee. . . .

(App., p. 13a) Similarly, noting the evidence that "price elasticity of demand" for liquor "varies significantly in different parts of the country," the Court of Appeals said,

> [W]e agree that the natural tendency of the Tennessee statute is to impair the efficiency of the interstate liquor market and to deprive consumers of the benefits, if that is the word, of access to the most liquor for the least money.

(App., p. 9a)

The Tennessee statute does not require any posting of prices to be charged there. Consequently, that statute does not require suppliers to affirm that they will adhere for any period to prices posted in advance, does not require

governmental approval to change prices there or elsewhere, and does not impose any waiting period before prices can be changed anywhere. The Court of Appeals decided, therefore, that the "Tennessee statute leaves distillers free to change their out-of-state prices at will" and that it "lacks the obvious extraterritorial reach [of the prospective] New York statute" which was found in *Brown-Forman* to run afoul of the Commerce Clause. (App., p. 2a)

Based upon its interpretation of *Brown-Forman*, the Court of Appeals stated that the question before it was "whether Tennessee has actually undertaken to 'regulate' liquor prices in other states." (App., pp. 9a-10a) The court then concluded that *Brown-Forman* holds only "that a statute making it illegal to reduce out-of-state prices is a statute that 'directly regulates' such prices in violation of the Constitution." (App., p. 10a) *Brown-Forman*, according to the Court of Appeals, does *not* teach

> that where a price affirmation statute has the effect of making out-of-state price cuts costlier to the distiller, the statute is unconstitutional even though it does not make such price cuts illegal, as the New York statute did.[4]

(App., p. 10a)

4. The opinion below further states:

> All the distiller can argue here is that the Tennessee statute tends to discourage out-of-state price reductions—because such price reductions must be replicated in Tennessee—just as the statute tends to encourage price increases outside Tennessee, because Tennessee prices cannot be raised without raising foreign prices as well. Price moves as such are not illegal anywhere, as far as Tennessee is concerned, although they may be more costly, from the distiller's standpoint than they would be in the absence of the statute.

(App., pp. 11a-12a)

The Court of Appeals relied upon *Seagram* for its conclusion that non-prospective affirmation statutes, although they force higher prices in other states and make out-of-state price reductions costlier by also forcing the supplier to reduce its prices and revenues in the affirmation states, are not the "direct regulation" of prices in violation of the Commerce Clause:

> The teaching of the Supreme Court's decision in *Seagram*, as we understand it, is that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible "regulation" of out-of-state liquor prices.
>
> * * * *
>
> The [retrospective New York statute upheld in *Seagram* was] more restrictive than the Tennessee statute. Under the New York statute a distiller could not lower wholesale prices anywhere outside New York without locking itself into a correspondingly low price in New York for all of the next month, while the Tennessee law has no comparable effect. If the New York statute did not constitute "regulation" of out-of-state prices, therefore, it follows *a fortiori* that the Tennessee statute does not constitute such regulation.
>
> * * * *
>
> If *Seagram* is still good law, this means that Tennessee "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." That, and nothing more than that, is what Tennessee has done in the statute before us.
>
> While the natural tendency of the [retrospective] New York law to increase out-of-state costs would seem to have been just as apparent on its face as is the corresponding tendency of the Tennessee statute, the *Seagram* opinion does mention that the actual effects of

> the New York statute on the distiller's business outside the state were "largely matters of conjecture." . . .
>
> * * * *
>
> On its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*. If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that lower courts ought to follow *Seagram* in every case to which that decision obviously applies.

(App., pp. 12a-14a)

Finally, the Court of Appeals rejected Brown-Forman's contentions that the Tennessee statute, in depriving out-of-state residents of their local competitive advantages, was "simple economic protectionism" and a virtual *per se* violation of the Commerce Clause. See *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Brown-Forman*, 476 U.S. at 579-580. Again relying upon *Seagram*, the court ruled:

> Where the Twenty-first Amendment is concerned, however, the short answer to this argument would seem to be that *Seagram* expressly rejected it: "As part of its regulatory scheme for the sale of liquor, [a state] *may* constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43 (Emphasis supplied) There has been no showing here that the Tennessee statute "disadvantages" out-of-state consumers any more than the statute upheld by the Supreme Court in *Seagram* did. . . .
>
> * * * *
>
> *Seagram* teaches that statutes comparable to Tennessee's do not, on their face, "discriminate" against interstate commerce, . . .

(App., pp. 16a-17a)

Holding that the District Court erred as a matter of law in declaring the Tennessee statute unconstitutional, the Court of Appeals reversed and remanded with instructions to dismiss the complaint.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's Decision That The Tennessee Affirmation Statute Does Not Violate The Commerce Clause Conflicts With The Principles Or Reasoning Of Applicable Decisions Of This Court

The Sixth Circuit has taken an unjustifiably narrow view of what constitutes that "direct regulation" of out-of-state transactions which is a virtual *per se* violation of the Commerce Clause. Citing *Brown-Forman,* it has determined that only an affirmation statute "making it illegal to reduce out-of-state prices . . . 'directly regulates' such prices in violation of the Constitution." (App., p. 10a)

Inexplicably, the Sixth Circuit has determined that affirmation statutes are constitutional if they merely make out-of-state price reductions costlier by compelling suppliers, as a condition to selling there, to reduce their prices in the affirmation states, too, risking diminished revenues there. It made that determination in the face of its conclusion that the evidence in this case confirms that the inevitable effect of the Tennessee statute on out-of-state transactions is to increase supplier prices and costs to wholesalers in other states and to deprive consumers there of the market efficiencies which could afford them lower prices.

The Sixth Circuit misreads this Court's decision in *Brown-Forman;* the determination below conflicts with the principles and reasoning of *Brown-Forman* and the Court's endorsement there (476 U.S. at 582) of *United States Brewers Ass'n.* v. *Healy,* 692 F.2d 275 (2d Cir., 1982), *aff'd mem.,* 464 U.S. 909 (1983) (*"Healy I"*). This Court did *not* hold or suggest that only "a statute making it illegal to reduce out-of-state prices is a statute that 'directly regulates' such prices in violation of the Constitution." (App., p. 10a)

The New York prospective affirmation statute overturned in *Brown-Forman* did not "make out-of-state price reductions illegal." Instead, it prohibited and made illegal only sales to New York wholesalers if, during the month-long period that the posted New York price was in effect, an out-of-state sale was made at a lower price.[5] In deciding that the New York statute fell "within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids" because it "effectively regulate[d] the price at which liquor is sold in other States," this Court looked to "the overall effect of the statute on both local and interstate commerce" as the "critical consideration" (476 U.S. at 579) in determining whether "the 'practical effect' of the law is to control liquor prices in other States." *Id.* at 583.

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5. The majority opinion in *Brown-Forman* states:

> The State of New York requires every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States. The issue in this case is whether that requirement violates the Commerce Clause of the Constitution.

476 U.S. at 575.

Throughout its *Brown-Forman* opinion, this Court made it clear that the controlling principle is whether or not the "practical effect" of an affirmation statute is to leave a supplier free to change its prices elsewhere in the United States in response to differing market conditions and competitive forces, because "regulation tending to 'mitigate the consequences of competition between the states' constitutes direct regulation." *Id.* at 581-582. Similarly, because a law which "disadvantages consumers in other States" is "the sort of 'simple economic protectionism' that this Court has routinely forbidden," the Court concluded in *Brown-Forman* that

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. . . . Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States.

Id. at 580. (Citations omitted)

The reasoning of *Brown-Forman* conflicts with the Sixth Circuit's reliance upon *Seagram* as "teaching . . . that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible 'regulation' of out-of-state liquor prices." (App., p. 12a) In concluding that the practical effect of New York's prospective statute was to interfere with the freedom of suppliers in their operations in other states to lower prices in response to competitive forces there and that "[t]hus New York has 'project[ed] its legislation' into other States, and directly

regulated commerce therein . . .," the Court indicated that the principles articulated in *Brown-Forman* are not confined to prospective affirmation requirements:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a propective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. . . . Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

476 U.S. 584 n.6.

Not only the trial court's findings of fact but the Sixth Circuit's conclusions that the evidence confirms the effect of affirmation in increasing out-of-state prices, impairing the ability of suppliers to price responsively to the differing competitive forces unique to each market, and depriving consumers in other states of the lower prices otherwise possible in the competitive circumstances of their markets make it clear that the decision below upholding the Tennessee statute is in conflict with the rationale of this Court's decision in *Brown-Forman*. Patently, based upon the principles articulated and the decisions of this Court cited in *Brown-Forman*,[6] "the 'practical effect' of the [Tennessee

6. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761 (1945); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *Schwegmann Bros. Giant Super Mkts.* v. *Louisiana Milk Comm'n*, 365 F. Supp. 1144 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974).

statute] is to control liquor prices in other states" and to establish "simple economic protectionism." *Id.* at 583.

The Sixth Circuit's reliance upon the Twenty-first Amendment is also misplaced where the practical effect of an affirmation statute is the extraterritorial regulation of prices in other states and the achievement of economic protectionism. Such reliance upon the Amendment conflicts with this Court's reasoning in *Brown-Forman*. The Court held there that the Amendment could not immunize the New York statute's control of pricing in out-of-state transactions. 476 U.S. at 585. See, also, *Bacchus*, *supra*, 468 U.S. 263.

II.

The Sixth Circuit's Decision That The Tennessee Affirmation Statute Does Not Violate The Commerce Clause Conflicts With The Decision Of The Second Circuit in *Healy II*, As To Which This Court Has Noted Probable Jurisdiction

In *The Beer Institute* v. *Healy*, 849 F.2d 753 (2d Cir. 1988) ("*Healy II*"), the Second Circuit held unconstitutional on its face a contemporaneous affirmation requirement for beer enacted by Connecticut after its earlier prospective statute was overturned in *Healy I*. The amended statute imposed absolutely no prerequisite to lowering prices at any time in other states below those posted and then being charged in Connecticut. That Connecticut statute clearly did not "make it illegal to reduce out-of-state prices," and the Second Circuit's holding that the statute directly regulated beer prices in other states in violation of the Commerce Clause conflicts with the decision below by the Sixth Circuit.

The amended Connecticut statute continued the previous price-posting requirement that, as a condition to selling beer to Connecticut wholesalers, a schedule effective for each calendar month had to be filed and adhered to throughout the month. The amended statute, however, provided that for affirmation purposes the lowest price charged to any wholesaler in the three bordering states was to be determined at the time of filing. 849 F.2d at 754-755. Even though brewers had to adhere in Connecticut to their posted prices for the full calendar month, the amended statute expressly provided that they were not prohibited from changing their prices in other states "at any time during the calendar month covered by such posting" in Connecticut, and that was confirmed by an administrative ruling. *Id.* at 755-756.

Thus the amended Connecticut statute allowed price reductions at any time in other states without requiring that higher prices posted and charged in Connecticut be lowered to the same level.[7] Connecticut required only that the price posted and charged there each calendar month be as low as the lowest price in its three bordering states at the instant prices were filed in the preceding month. That price might or might not be the lowest price charged in those states by the brewer during either the month it was

7. As the Second Circuit stated,

> [The Connecticut amended statute] mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section . . . . Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

849 F.2d at 756.

posted or the following month in which it was in effect and had to be adhered to in Connecticut.

The Tennessee statute, by contrast, interferes far more with the freedom of suppliers to lower their prices elsewhere in response to differing competitive conditions. Even with no price-posting and adherence requirement, Tennessee effectively requires that suppliers' prices to wholesalers there perpetually must be the lowest charged anywhere. That more restrictive result follows from the requirement that the price on every sale must be the lowest anywhere else " 'at the very time of sale to a Tennessee wholesaler.' " (App., p. 4a, n.3)

Notwithstanding the fact that the amended Connecticut statute left brewers free at any time to lower their out-of-state prices below those posted and being charged in Connecticut, the Second Circuit held that, on its face, the statute's contemporaneous "price affirmation provisions directly regulate interstate commerce in violation of the Constitution." 849 F.2d at 758. Relying upon *Brown-Forman*, the court declared:

> The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," . . . and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which is appropriately considered.[8]

8. In *Brown-Forman*, one of several illustrations of the inevitable and impermissible effects apparent on the face of New York's statute that the Court noted was the "ease with which New York's lowest-price regulation can interfere with a distiller's operations in other States" because its interaction with the different regulatory schemes of those other states could impose conflicting or inconsistent obligations. 476 U.S. at 583-584.

Id. at 758. (Citations omitted) Considering the effect upon the brewers' pricing decisions of the interaction between Connecticut's affirmation statute and the price regulations of the border states, the *Healy II* court concluded, even without considering the issue of economic protectionism, that

> the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," [citing *Healy I*. 692 F.2d at 282].

Id. at 757-758.

Analyzing the price regulations of states bordering Connecticut, the Second Circuit concluded that in practical effect brewers were not free to set their prices in Massachusetts, New York and Rhode Island in terms of the competitive market realities there. Instead, the brewers' pricing decisions in those states had to be made in contemplation of the effect of the Connecticut affirmation requirement. In setting prices in those states, the brewers had to "look ahead," recognizing that their pricing decisions in other states had to be their decision for Connecticut as well. They could "undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states." *Id.* at 758-760.

To the extent that the amended Connecticut statute thus inevitably interfered with the brewers' competitive responses to what the market forces unique to each market, in or out of Connecticut, would otherwise dictate, so does the Tennessee statute require wine and spirits suppliers to compromise and dilute their pricing decisions to accommo-

date regulatory requirements rather than react solely to differing competitive forces. The Sixth Circuit's decision, in disregarding these controlling considerations, squarely conflicts with that of the Second Circuit in *Healy II*.

On November 14, 1988, the Court noted probable jurisdiction in *Healy II* (*Healy* v. *The Beer Institute*, No. 88-449 and *Wine and Spirits Wholesalers of Connecticut, Inc.* v. *The Beer Institute*, No. 88-513).

III.

The Decision Of The Sixth Circuit Raises Important Issues Affecting The Adoption Of Affirmation Requirements In States Other Than Just Tennessee, Pending Cases In Federal And State Courts, Effective Price Competition In The Alcoholic Beverage Industries, And The Current Viability Or Applicability Of *Seagram*—Issues Which Require Resolution By This Court

While some states stopped enforcing their affirmation statutes after the Court's decision in *Brown-Forman*, at least eight still impose affirmation requirements on one or more types of alcoholic beverages.[9] As the proliferation of affirmation statutes adopted by more than twenty states following New York's enactment of the pioneer statute reviewed in *Seagram* demonstrates, the lowest-price affirmation concept is one of substantial political appeal. As shown by Connecticut's enactment of its amended beer affirmation statute after its prospective statute was struck down in *Healy I*, if any form of affirmation can withstand constitu-

9. Arizona, California, Connecticut, Florida, Georgia, Oklahoma, Rhode Island, and Tennessee.

tional muster then the adoption of such requirements by many if not all of the approximately thirty open states is likely.

In the highly regulated alcoholic beverage industries, the extraterritorial impact of affirmation interacts with and affects the compatibility of the differing regulatory systems of the various states. As the Court noted in *Brown-Forman*, affirmation laws increase the likelihood that suppliers will be subjected to inconsistent obligations in different states resulting in interference with their operations in states other than just the regulating state. 476 U.S. at 583.

The constitutionality of affirmation provisions has been a recurring issue before this Court and others. The Court's noting probable jurisdiction in *Healy II* attests to the continuing importance of the issue. The conflict between the decision of the Second Circuit there and the determination of the Sixth Circuit in this case demonstrates that, even after *Brown-Forman*, confusion still exists as to the current viability of *Seagram* or the scope of its application to affirmation statutes other than those which impose prospective requirements. That confusion is evidenced by the differing views which have been expressed by the lower federal courts in cases decided since *Brown-Forman* and *Healy I*.[10] Apart from *Healy II* and this case, other pending litigation

10. *See Brown-Forman Corp.* v. *South Carolina Alcoholic Beverage Control Comm'n*, 643 F. Supp. 943 (D.S.C. 1986); *Brown-Forman Corp.* v. *Delaware Alcoholic Beverage Control Comm'n*, No. 87-20 LON (D. Del. Dec. 17, 1987); *Brown-Forman Corp.* v. *New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383 (D.N.M. 1987); *United States Brewers Ass'n* v. *Healy*, 669 F. Supp. 543 (D. Conn. 1987), *rev'd sub nom. The Beer Institute* v. *Healy*, 849 F.2d 753 (2d Cir. 1988).

will be determined on the issue of the constitutionality of affirmation requirements.[11]

Alcoholic beverage sales at wholesale substantially exceed 25 billion dollars a year annually. If conflict and uncertainty as to the validity of the affirmation concept continue, if the decision below by the Sixth Circuit stands, and if more states are thus encouraged to enact affirmation laws, billions of dollars of alcoholic beverage sales each year are likely to become subject to a kind of monolithic, uniform and inflexible price regulation which will tend to set a common floor below which prices cannot respond to free market forces, including markedly differing competitive exigencies varying from state to state.

Such undesirable price regulation does not promote temperance or any other goal properly related to the Twenty-first Amendment. Instead, it is designed only to achieve economic protectionism by assuring price parity to the residents of each regulating state while denying to those in other states the possibility of lower prices resulting from different competitive forces there.

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11. Brown-Forman is challenging the constitutionality of Florida's retrospective affirmation statute in a declaratory judgment action brought in the Northern District of Florida. *Brown-Forman Corp.* v. *Daniel J. Bosanko, Director, and the Division of Alcoholic Beverage Control and Tobacco of the Department of Business Regulation of the State of Florida,* N.D. Fla., Tallahassee Div., Civ. No. 87-40321-MP. In *United States Brewers Ass'n* v. *Director of the New Mexico Dep't of Alcoholic Beverage Control,* No. SF 79-1139(C), pending in the First Judicial District, County of Santa Fe, State of New Mexico, the State is claiming $12 million in damages and $5 million in interest for alleged violation of its affirmation statutes by The Stroh Brewery Company.

Conclusion

For these reasons, Brown-Forman urges that this petition for certiorari should be granted.

Respectfully submitted,

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February 1, 1989

APPENDIX

Opinion Of The United States Court Of Appeals For The Sixth Circuit

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-5870/5913

BROWN-FORMAN CORPORATION,
Plaintiff-Appellee,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,
Defendants-Appellants
(87-5913),

LICENSED BEVERAGE WHOLESALERS OF TENNESSEE,
Intervenor-Appellant
(87-5870).

On Appeal from the United States District Court
for the Middle District of Tennessee.

Decided and Filed November 4, 1988

Before: KRUPANSKY and NELSON, Circuit Judges, and HACKETT, District Judge.*

DAVID A. NELSON, Circuit Judge. The laws of the State of Tennessee prohibit any distiller from making a sale of

* The Honorable Barbara Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

alcoholic beverages to a wholesaler in Tennessee at a price higher than that being charged, contemporaneously with the Tennessee sale, to a wholesaler in any other state. Tenn. Code Ann. § 57-3-202(e). The Tennessee statute leaves distillers free to change their out-of-state prices at will, without notice and without the approval of any Tennessee official.

Plaintiff Brown-Forman Corporation, a distiller and national marketer of alcoholic beverages, brought the present action to obtain a declaratory judgment on the constitutionality of the Tennessee statute. In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Supreme Court had recently invalidated a New York liquor-pricing statute which was geared to out-of-state prices that had to be certified in advance, and which made it illegal to change the out-of-state prices without New York's approval. Relying principally upon that decision, the district court held that on its face the Tennessee statute violates the Commerce Clause of the United States Constitution.[1] In our opinion, however, the Tennessee law lacks the obvious extraterritorial reach that the New York statute had, and we do not believe the Tennessee statute runs afoul of the negative implications of the Commerce Clause. We are strengthened in this conclusion by the implications of the Twenty-first Amendment, with its constitutional prohibition against the transportation of intoxicating liquors into any state for use in that state "in violation of the laws thereof."

1. The district court did not use the phrase "dormant Commerce Clause," but might well have done. The court believed that the Tennessee statute affects interstate commerce in a way violative of what Mr. Justice Frankfurter called the "negative implications" of the constitutional grant to Congress of the power to regulate commerce among the several states. Extraterritorial legislation is often said to violate the Commerce Clause in its negative, or "dormant," aspect.

I

In considering whether the Tennessee liquor-pricing law goes further than the Constitution allows, it is important to understand not only what the law says, but also what it does not say. Unlike the "affirmation" laws of many other states, the Tennessee statute does not require distillers to affirm that they will comply with price schedules posted in advance.[2] The Tennessee statute does not require any posting of prices, it does not impose any waiting period before prices can be changed. It does not purport to control the timing or amount of out-of-state price changes. And it does not require that governmental approval be obtained before prices are changed within the state, just as it does not require governmental approval before prices are changed outside the state.

All the Tennessee statute does, in essence, is tell distillers that when they sell or offer to sell liquor to a wholesaler in Tennessee, they may not willfully charge or quote a price in excess of any wholesale price currently being charged or quoted by the distiller outside the state. The mechanism by which Tennessee guards against such price discrimination is as follows:

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2. A recent student law review note says that "[a]ll affirmation statutes begin by requiring producers to file monthly schedules listing the prices they will charge distributors in the state during the upcoming month." Note, "Liquor Price Affirmation Statutes and the Dormant Commerce Clause," 86 Mich. L.Rev. 186, 190 (1987). The Tennessee statute is an affirmation statute, but it imposes no such requirement. The Note argues that "*all* liquor price affirmation statutes violate the commerce clause." *Id.* at 188. The faulty premise may be immaterial as far as the affirmation laws of many states are concerned—see, *e.g.*, *In re The Beer Institute*, 849 F.2d 753, 760 (2d Cir. 1988), where the Note is cited in connection with a Connecticut statute that did require advance posting of price schedules—but the Note's argument is not to be accepted uncritically in the case of Tennessee.

— Before offering any brand of alcoholic beverage for sale to any licensed wholesaler in Tennessee, every manufacturer, distiller, broker, or vintner of any such beverage is required to file with Tennessee's Alcoholic Beverage Commission an "affirmation of corporate policy." Tenn. Code Ann. § 5703-202(e)(1).

— The "affirmation of corporate policy" must certify that the seller will "not willfully sell or offer for sale any alcoholic . . . beverages of a particular brand, proof or size, in Tennessee at a price higher than the price [at which] such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States," *Id.*, Subsection (2).[3]

— The term "price" is defined as "platform price at the distillery." Price differentials based on transportation costs are expressly allowed, as are nondiscriminatory quantity discounts. *Id.*, Subsection (3). The Alcoholic Beverage Commission also interprets the statute as allowing "promotional discounts"—no-strings credits given to the wholesaler for promotion of the distiller's brands.

— The making of a false affirmation, the failure to file a required affirmation, or the willful violation of the pledges contained therein, may be punished as a misdemeanor and may result in suspension or revocation of the privilege to import and sell alcoholic beverages in Tennessee. *Id.*, Subsections (4) and (5).

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3. The Tennessee Attorney General has ruled that this is a "contemporaneous affirmation requirement" which "means that a supplier must affirm that its prices are no higher than its prices elsewhere *at the very time of sale to a Tennessee wholesaler.*" Tennessee Attorney General Opinion 86-147, p.5. (Emphasis supplied.)

The Tennessee statute was enacted in 1975. In June of 1986 the United States Supreme Court handed down its decision in *Brown-Forman, supra,* 476 U.S. 573. The following month Brown-Forman sent the Tennessee Alcoholic Beverage Commission a two paragraph letter stating, in pertinent part:

> "The U.S. Supreme Court's recent decision *(Brown-Forman Distillers Corporation v. New York State Liquor Authority* No. 84-2080, decided June 3, 1986) declaring New York's affirmation statute unconstitutional is applicable to the affirmation law of *all* states and, accordingly, the existing affirmation is hereby withdrawn." (Emphasis in original.)

The Commission forwarded the letter to the Attorney General of Tennessee, requesting an opinion on the issue raised by Brown-Forman. The Attorney General responded with a seven-page opinion letter explaining why Tennessee's statute is distinguishable from New York's and concluding that the Tennessee statute does not contravene the Commerce Clause. The Commission accepted the Attorney General's conclusion, and Brown-Forman was so advised.

Brown-Forman thereupon sued the Commission in the United States District Court for the Middle District of Tennessee, asserting that Tenn. Code Ann. § 57-3-202(e) is unconstitutional and requesting declaratory and injunctive relief. After a two-day trial the district court filed a memorandum opinion holding the statute "facially unconstitutional because of its effect on interstate commerce." The opinion was accompanied by an order permanently enjoining enforcement of the statute. This appeal followed.

II

Whatever the effect on interstate commerce of a state statute prohibiting sales of liquor at discriminatory prices, it could hardly be more direct or more profound than the effect of prohibiting sales of liquor altogetehr. No state currently does that—notwithstanding William Allen White's tongue-in-cheek prediction that "Kansans will vote dry as long as they can stagger to the polls"—but under the second section of the Twenty-first Amendment,[4] every state may do so. The negative implications of the Commerce Clause notwithstanding, every state has "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). The Twenty-first Amendment thus "directly qualifies the federal commerce power," as the Supreme Court recently noted, despite the fact that "the Court has rejected the view 'that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned.' " *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987), quoting *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331-32 (1964). (What the *Idlewild* case made clear, as Mr. Justice Stewart said in *Joseph E. Seagram & Sons. Inc. v. Hostetter*, 384 U.S. 35, 42 (1966), was that "the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor.")

Even where products other than liquor are concerned, state regulation that falls short of complete prohibition does

4. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

not necessarily impose an impermissible burden on interstate commerce merely because it discourages some out-of-state manufacturers from selling within the state, to the injury of the consuming public. *Exxon Corp. v. Maryland*, 437 U.S. 117, 127-28 (1978). But even in the case of alcoholic beverages, no state is entitled to regulate sales in other states. It is not up to Tennessee to decide whether the sale and consumption of liquor will be prohibited in Kentucky, for example. Whether extraterritorial regulation is ruled out by the negative implications of the Commerce Clause or by "the structure of the Constitution as a whole," as Professor Donald H. Regan argues in his "Siamese Essays," 85 Mich. L. Rev. 1865 and 1884 (1987), it is well settled that although a state "may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid for liquor in those States.'" *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-83, 90 L.Ed.2d 552, (1986) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

First and foremost among the questions presented in the case at bar, then, is whether Tennessee has projected its legislation into other states by "regulating" the price to be paid for liquor there. If it has, the district court was correct in holding the legislation unconstitutional.

III

At trial, Brown-Forman presented evidence characterized by the district court as suggesting that Tennessee's statute "distorts the market forces of supply and demand, prevents the use of aggressive price promotion as a market-

ing tool to attain profit maximization and also impairs the ability to introduce new products in other states." A witness for Brown-Forman maintained that it "was rarely a feasible option" for the company to try to improve out-of-state sales of a slow-moving item by cutting out-of-state prices, because the Tennessee statute would require a corresponding cut in prices in Tennessee even if the item should already be selling well in Tennessee.

The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remain unknown. The district court thought it clear, nonetheless, that the inevitable tendency of the Tennessee statute would be to control prices in other states:

> "It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market. . . ."

This is the basis for the district court's conclusion that the statute is unconstitutional.

IV

We agree with the district court that if a distiller desires to raise prices in Tennessee, the statute clearly prevents that desire from being gratified unless prices are raised simultaneously wherever the product in question is being sold outside the state. But paraphrasing an observation

made by Mr. Justice Stewart in *Seagram*, "[i]t is by no means clear . . . that [Tenn. Code Ann. § 57-3-202(e)] must inevitably produce higher prices in other States . . . rather than the lower prices sought for [Tennessee]." 384 U.S. at 43. It is impossible to tell from the record of this case to what extent Brown-Forman may actually have raised out-of-state prices in order to indulge a desire to raise prices in Tennessee, just as it is impossible to determine to what extent Brown-Forman may actually have refrained from lowering prices outside Tennessee in order to avoid having to lower prices within Tennessee. Nevertheless, if the price elasticity of demand for different types of liquor varies significantly in different parts of the country—and the record suggests that it probably does—we agree that the natural tendency of the Tennessee statute is to impair the efficiency of the interstate liquor market and to deprive consumers of the benefits, if that is the word of access to the most liquor for the least money.

As noted above, however, such market distortions would not necessarily mean that the statute is unconstitutional, even if the products in question were not covered by the Twenty-first Amendment. See *Exxon Corp. v. Maryland, supra*, 437 U.S. 117. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within the domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U.S. 53, 62(1940). And the Tennessee statute has not been shown likely to produce greater distortions in the interstate market than would a statute prohibiting Tennessee liquor sales altogether.

The question before us is not whether Tennessee's liquor-pricing statute is likely to have "repercussions" on liquor prices in other states, but whether Tennessee has

actually undertaken to "regulate" liquor prices in other states, See *Brown-Forman,* 476 U.S. at 580, where the Court, speaking through Justice Marshall, said that the inquiry "must center on whether New York's affirmation law *regulates* commerce in other States." (Emphasis supplied.)

In *Brown-Forman,* the distiller argued that the New York statute not only tended to make it more costly to reduce prices in other states, but actually "makes it *illegal* for a distributor to reduce its price in other states during the period that the posted New York price is in effect." *Id.* at 579-80. (Emphasis supplied.) The Supreme Court agreed that this was precisely how the New York statute worked, and the Court held, not surprisingly, that a statute making it illegal to reduce out-of-state prices is a statute that "directly regulates" such prices in violation of the Constitution:

> "Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month.[5] Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commercie." 476 U.S. at 582.*
>
> "[5] The Liquor Authority may 'for good cause shown' permit a distiller to change its prices dur-

* In *Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commission,* 643 F.Supp. 943 (D.S.C. 1986), the South Carolina district court read the Supreme Court's *Brown-Forman* decision as requiring the invalidation of a South Carolina statute that bore little resemblance to New York's, but was essentially identical to Tennessee's. The district court seems to have interpreted *Brown-Forman* as teaching that where a price affirmation statute has the effect of making out-of-state price cuts costlier to the distiller, the statute is unconstitutional even though it does not make such price cuts illegal, as the New York statute did. We disagree with the district court's interpretation, which seems to deprive the Supreme Court's holding in *Seagram* of all meaning. The district court's decision was not appealed, so we do not know where the Court of Appeals for the Fourth Circuit would have come out on this question.

> ing a particular month, ABC Law § 101-b(3)(a). and New York speculates that the Authority would permit a distiller to lower its prices in other States in a given month so long as the distiller also lowers them in New York. However, whether to permit such a deviation from the statutory scheme is a matter left by the statute to the discretion of the Liquor Authority.
>
> We would not solve the constitutional problems inherent in New York's statute by indulging the dissent's assumption that the Authority will be sensitive to Commerce Clause concerns. Certainly New York could not require an out-of-state company to receive a license from New York to do business in other States, even if we were quite sure that such licenses would be granted as a matter of course. Similarly, New York simply may not force appellant to seek regulatory approval from New York before it can reduce its prices in another State. The protections afforded by the Commerce Clause cannot be made to depend on the good grace of a state agency."

The case at bar presents a very different situation from that presented in the Supreme Court's *Brown-Forman* case. Here the distiller is not arguing that the statute in question makes it "illegal" for a distiller to reduce its prices in other states without permission, and there is no conceivable basis on which a court could attribute such an effect to the Tennessee statute. All the distiller can argue here is that the Tennessee statute tends to discourage out-of-state price reductions—because such price reductions must be replicated in Tennessee—just as the statute tends to encourage price increases outside Tennessee, because Tennessee prices

cannot be raised without raising foreign prices as well. Price moves as such are not illegal anywhere, as far as Tennessee is concerned, although they may be more costly, from the distiller's standpoint, than they would be in the absence of the statute.

V

The teaching of the Supreme Court's decision in *Seagram,* as we understand it, is that a tendency to increase the distiller's out-of-state costs is simply not enough to convert an otherwise constitutional state liquor law into an impermissible "regulation" of out-of-state liquor prices.

Seagram dealt with a New York statute that required distillers and other owners of liquor brands to file monthly price schedules accompanied by an affirmation that the price of each item listed on the schedule was "no higher than the lowest price at which such item of liquor was sold by such brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month immediately preceding the month in which such schedule is filed," Chapter 531, 1964 Session Laws of New York § 9, as quoted in *Seagram,* 384 U.S. at 350. The New York statute was thus more restrictive than the Tennessee statute. Under the New York statute a distiller could not lower wholesale prices anywhere outside New York without locking itself into a correspondingly low price in New York for all of the next month, while the Tennessee law has no comparable effect. If the New York statute did not constitute "regulation" of out-of-state prices, therefore, it follows *a fortiori* that the Tennessee statute does not constitute such regulation.

The Supreme Court recognized in *Seagram,* just as it did in *Brown-Forman,* "that the most important issue was

whether the statute regulated out-of-state transactions." *Brown-Forman*, 476 U.S. 581, referring to *Seagram*, 384 U.S. at 42-43. And the Supreme Court concluded, in *Seagram*, that

> "The mere fact that § 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, *New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.*" (Emphasis supplied.)

If *Seagram* is still good law, this means that Tennessee "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country." That, and nothing more than that, is what Tennessee has done in the statute before us.

While the natural tendency of the New York law to increase out-of-state costs would seem to have been just as apparent on its face as is the corresponding tendency of the Tennessee statute, the *Seagram* opinion does mention that the actual effects of the New York statute on the distiller's business outside the state were "largely matters of conjecture." The court noted that it would be time enough to assess the actual effects of the New York law "when a case arises that clearly presents them." 384 U.S. at 43. *Seagram* was not that case, and the court merely held that the statute was not unconstitutional on its face.

The record in the case at bar confirms that the natural tendency of the Tennessee statute is to increase costs outside of Tennessee, but like the record in *Seagram*, it does not quantify the costs involved. Perhaps this is one of the

reasons why the district court thought that the issue before it was "whether the [Tennessee] affirmation statute, *on its face,* violates the Commerce Clause of the United States Constitution." (Emphasis supplied.) In holding that the Tennessee statute does, "on its face," violate the Commerce Clause, the district court gave an answer diametrically opposed to the answer given by the Supreme Court in *Seagram.*

VI

It is true, as the Court of Appeals for the Second Circuit recently had occasion to observe, that the Supreme Court's opinion in *Brown-Forman,* and Justice Blackmun's concurrence in that case, have "cast doubt upon the continuing validity of the principles underlying *Seagram.*" *In re The Beer Institute,* 849 F.2d 753, 760 (2d Cir. 1988). It is also true, however, that courts of appeals "are not empowered to overrule Supreme Court precedent." *Id.* Only the Supreme Court can do that—and the last time the Supreme Court had an opportunity to overrule *Seagram,* it declined to do so. Because a *Seagram*-like statute was not before the Court in *Brown-Forman,* the *Brown-Forman* court simply said that "we need not consider the continuing validity of *Seagram.*" *Brown-Forman,* 476 U.S. 584 n.6.

On its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram.* If the Supreme Court should wish to decide whether *Seagram* is still valid, therefore, this would probably be a good case in which to do it. If not, we assume that lower courts ought to follow *Seagram* in every case to which that decision obviously applies.

The Second Circuit's interpretation of the *Seagram* decision does not necessarily differ from ours. See *United*

States Brewers Association, Inc. v. Healy, 692 F.2d 275, 283-84 (2d Cir. 1982), *affirmed without opinion*, 464 U.S. 909 (1983):

> "Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate . . . a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states see 384 U.S. at 43-45, 86 S.Ct. at 1260-1261, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive method of controlling the minimum prices at which liquor may be sold outside of its own territory.'

The Connecticut statute that was held unconstitutional in *Healy* told a brewer "that for any given month when it sells beer to a wholesaler in Massachusetts, in New York or in Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers." *Id.* at 282. The Tennessee statute, in contrast, exercises no control over out-of-state prices; it simply requires that a distiller set its Tennessee prices at the lowest levels it chooses to set in other states. That requirement, as the Second Circuit acknowledged, "may well' be validated by the holding in *Seagram*.

The Connecticut statute considered by the Second Circuit in *Beer Institute* was an amended version of the one invalidated in *Healy*. The Connecticut legislature had attempted to fix the statute up along the lines laid out in *Healy*, but the court thought the job had been bungled. *Beer Institute*, 849 F.2d at 755-56. Read in conjunction with the liquor laws

of the surrounding states, the Connecticut statute still exercised control, "inevitably," over out-of-state prices. *Id.* at 758. The *Beer Institute* court declined "to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders." *Id.* at 760-61.

VII

In the case at bar there has been no claim that the Tennessee affirmation statute was designed to interact with the statutes of other states in such a way as inevitably to control prices beyond Tennessee's borders. What Brown-Forman told the Tennessee Alcoholic Beverage Commission, indeed, was that the *Brown-Forman* decision made "the affirmation law[s] of *all* states" unconstitutional.

If the interaction of Tennessee's law with the laws of the other states should somehow create an extraterritoriality problem, moreover, the fault would not necessarily be Tennessee's, as opposed to being the fault of the other states. In other contexts, the Supreme Court has resolved such questions by resort to an "internal consistency" test reminiscent of Kant's categorical imperative; what would the effect be, the Court asks, if the statute under consideration were adopted in identical form by all states? See *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). If the results of such universal adoption would be unacceptable the statute may not pass constitutional muster.

Tennessee statute would pass the "internal consistency" test without difficulty. If every state adopted a liquor pricing statute identical to Tennessee's, market forces might, to be sure, be distorted enough to make Adam Smith turn in

his grave. But "[t]he Constitution does not require the States to subscribe to any particular economic theory," *CTS Corp. v. Dynamics Corp. of America*, 481 U.S.—,—, 95 L.Ed.2d 67, 87 (1987), and with universal adoption of laws such as Tennessee's, no state would be forbidding any distiller to reduce its prices in any foreign state. Perhaps an out-of-state price cut would cost the distiller more than it would in a free market, but, under uniform affirmation laws identical to Tennessee's, no such price cut would be illegal.

VIII

The plaintiffs in *Beer Institute* raised an "economic protectionism" issue that the Second Circuit found it unnecessary to reach in view of its holding that the Connecticut statute "inevitably exercise[d] control" over out-of-state prices and thus constituted a direct regulation of interstate commerce. 849 F.2d at 757-58. Brown-Forman contends here, as it contended in its challenge to the New York statute, that a law which disadvantages consumers in other states represents "the sort of 'simple economic protectionism' that [the Supreme Court] has routinely forbidden." *Brown-Forman*, 476 U.S. at 580, quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 524 (1978). Where the Twenty-first Amendment is concerned, however, the short answer to this argument would seem to be that *Seagram* expressly rejected it: "As part of its regulatory scheme for the sale of liquor, [a state] *may* constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 43. (Emphasis supplied.) There has been no showing here that the Tennessee statute "disadvantages"

out-of-state consumers any more than the statute upheld by the Supreme Court in *Seagram* did. As a Tennessee distiller, moreover (see note 6, *infra*), Brown-Forman can hardly contend that the statute is unconstitutional because it treats local distillers more favorably than foreign distillers. *Cf. Bacchus Imports Limited v. Dias*, 468 U.S. 263 (1984).

IX

We note, finally, that in the post-*Brown-Forman* case of *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. —, 95 L.Ed.2d 67 (1987), the Supreme Court declared that "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." 481 U.S. at—, 95 L.Ed.2d at 84. In this connection the Supreme Court referred with evident approval to Professor Regan's article at 84 Mich. L. Rev. 1091 (1986) on "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause," *Id.*

Seagram teaches that statutes comparable to Tennessee's do not, on their face, "discriminate" against interstate commerce,[6] and Professor Regan—who has said that he is "inclined to think the Court was right" in *Brown-Forman*— also thinks that the type of retrospective affirmation laws upheld in *Seagram* "do not violate the extraterritoriality principle." Regan, "Siamese Essays," 85 Mich. L. Rev. at 1903, 1905.

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6. See also *Exxon Corp. v. Maryland*, 437 U.S. at 125-26. Just as in-state gasoline dealers had no competitive advantage over out-of-state dealers under the Maryland statute that was upheld in *Exxon*, in-state distillers have no competitive advantage over out-of-state distillers under Tennessee's affirmation statute. And, as Brown-Forman's complaint in this case discloses, Brown-Forman happens to *be* an in-state distiller. Brown-Forman is a Tennessee corporation, and readers of the company's magazine advertising may recall that Brown-Forman's Jack Daniel distillery is located in Lynchburg, Tennenessee.

Neither we presume, would Professor Regan consider such statutes impermissibly "protectionist." See 84 Mich. L. Rev. at 1244, where, in discussing Justice Marshall's opinion in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). Regan suggests that the Montana statute at issue in *Commonwealth Edison* does not even have a protectionist effect, much less a protectionist purpose, because "[n]o local economic factor is favored, even in the effect of the statute, vis-a-vis any foreign competitor." Precisely the same thing can be said of Tennessee's affirmation statute—and if Professor Regan is a reliable guide, there is no reason why the author of *Brown-Forman* should have any difficulty in reconciling the opinion in that case with Justice Stewart's opinion in *Seagram*.

If what the Supreme Court is doing, in its dormant Commerce Clause cases, is "preventing state protectionism, where protectionism is defined in terms of purposeful favoring of locals over their foreign competitors," 84 Mich. L. Rev. at 1206 (emphasis omitted), then the Tennessee statute is not endangered, for it is no more a "protectionist" or "discriminatory" statute than it is an extraterritorial one. We need not decide, of course, whether Tennessee's affirmation law could properly serve as a model for legislation aimed at products not covered by the Twenty-first Amendment. Brown-Forman's products *are* subject to the Twenty-first Amendment, and reading *Seagram* and *Brown-Forman* together, we do not see why in-state sales of those products may not be regulated in the way Tennessee has chosen to regulate them.

We are not concerned with the wisdom of Tennessee's law, obviously, but only with its constitutionality. "[A] law can be both economic folly and constitutional." *CTS*

Corp., 95 L.Ed.2d at 90 (Scalia, J., concurring). A law duly enacted by a state legislation with the assent of a state governor or over his veto, ought not to be set aside by an unelected federal judiciary unless the Constitution compels that drastic step.

We think the district court erred as a matter of law in its holding that the Tennessee statute is unconstitutional. The judgment of the district court is REVERSED, and the case is REMANDED with instructions to dissolve the injunction and dismiss the complaint.

Opinion Of The United States District Court For The Middle District Of Tennessee, Nashville Division

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Docket No. 3-86-0926

BROWN-FORMAN CORPORATION

vs.

THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.

MEMORANDUM

This action arose out of a complaint, filed October 30, 1986, in which plaintiff Brown-Forman Corporation (hereinafter "Brown-Forman") alleges that Tennessee's affirmation, statute, Tenn. Code Ann. § 57-3-202(e), is in violation of the Commerce Clause of the United States Constitution and, accordingly, seeks a declaratory judgment finding this statute unconstitutional. In addition, plaintiff seeks a permanent injunction enjoining the defendants from enforcing this statute and from taking any action in regard to plaintiff's failure to comply with the statute.

A hearing on plaintiff's initial motion for preliminary injunction was set for December 8, 1986. Prior to the hearing, a motion to intervene was filed by the Licensed Bever-

age Wholesalers of Tennessee (hereinafter "LBWT"), a trade association composed of Tennessee wholesalers who purchase alcoholic beverages from manufacturers and suppliers and then distribute the products to Tennessee retailers. On December 30, 1986, this Court issued an Order permitting LBWT to intervene and denying plaintiff's motion for preliminary injunction. Trial on the merits came on for hearing on February 4 and 5, 1987. This Memorandum constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and Rule 12(i) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee.

FINDINGS OF FACTS

Plaintiff Brown-Forman is a Tennessee corporation engaged in the importation, sale and distribution of a variety of alcoholic beverages. Brown-Forman distributes its brands in Tennessee, as well as other states throughout the country. Because Brown-Forman imports alcoholic beverages into Tennessee and sells them, it is subject to section 57-3-202(e). Section 57-3-202(e) requires manufactures [sic], distillers and other producers of alcoholic beverages to file an affirmation statement stating that such party will not willfully sell or offer for sale any alcoholic spirituous beverages or vintage alcoholic beverages at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States. Compliance with the affirmation statute is mandatory, and a failure to file the required statement results in the mandatory revocation or suspension of the manufacturer's license to import and sell alcoholic beverages in

Tennessee for a peroid of not less than one year. Tenn. Code Ann. 57-3-203(e)(5).

Plaintiff maintained an affirmation statement on file with the Tennessee Alcoholic Beverage Commission (hereinafter "the Commission") until July 25, 1986. On that date, plaintiff notified the Commission that it was withdrawing its statement. (Complaint, ¶¶ 10, 15). Since there had been no previous violation of the state affirmation law, the Commission had not taken any prior enforcement action nor had it promulgated any interpretative rules or regulations regarding enforcement of the law.

According to the Commission, the purpose of § 57-3-202(e) is to prevent suppliers of alcoholic beverages from discriminating in the price charged to Tennessee wholesalers and the price charged to wholesalers in other states for products of the same quality. (Tr. at 167). Mr. Elyon H. Davis, Director of the Commission testified that over one-half of Tennessee's population resides in counties that border other states and, accordingly, the affirmation statute attempts to prevent Tennessee consumers from crossing state lines and purchasing liquor to bring back into Tennessee for consumption. (Tr. at 168). To ensure this, the statute requires that a supplier's platform price at the distillery, at the time of its sale to a Tennessee wholesaler, be no higher than the platform price charged to wholesalers in other state. (Tr. at 169-170). As defined by § 57-3-202(e)(3), platform price does not include price differentials based on quantity discounts as long as the discount prices are offered to Tennessee wholesalers for purchases in the same quantities.

Brown-Forman supplies its products to approximately 2,000 wholesalers nationwide. (Tr. at 37). Each wholesaler purchases the goods it needs, reflecting its consumers'

demands, and, accordingly, Brown-Forman receives continuous daily orders as each wholesaler attempts to meet it unique needs. (Tr. at 37-38). Brown-Forman maintains records entitled depletion flash reports (hereinafter "depletion reports") that indicate the number of cases of Brown-Forman beverages that a wholesaler sells to a retailer. (Tr. at 9, 13). The depletion reports reflect case sales for Brown-Forman products on a brand by brand basis and details sales made during both monthly and yearly periods. (Tr. at 13, 14). The reports also contain a quota number reflecting the number of sales that Brown-Forman is seeking for each of its brands. (Tr. at 15). Attainment of the quota set by Brown-Forman is highly desirable since state and regional managers are assigned an individual quota and the bonus earned by each manager is tied to whether the quota assigned to a particular state or region is attained. (Tr. at 16).

To insure the accuracy of the depletion reports, Brown-Forman conducts an annual audit of each wholesaler by physically counting the number of cases on hand and then matching the audit report against the depletions (essentially sales) that have been reported by the wholesalers during the fiscal year. (Tr. at 10, 116). After the depletion reports have been submitted for a previous period, the manager of a particular state or territory meets with the general manager of the region and a representative of one of plaintiff company's brands to determine the target sales projection for that particular brand given previous sales, estimates of future market demand, sales promotion activity, pricing adjustments and other factors affecting the market environment. (Tr. at 16, 78).

At trial, plaintiff submitted its December 1987 Depletion Report. (Pltf's Ex. 1). Joseph Flock, executive assistant

to the executive director of sales for Brown-Forman, demonstrated to the Court the substantial regioinal variances in the sales figures of its various brands and how the sales figures affected the projected quota for the coming fiscal year. Mr. Flock testified that the depletion report demonstrated the need to lower the price of certain brands in various markets in order to increase sales and, hopefully, profits. (Tr. at 18-19) Mr. Flock, however, maintained that this was rarely a feasible option given that Tennessee's affirmation statute would require a downward adjustment in the price to Tennessee wholesalers of the same brand if the price in Tennessee was currently higher than the price in the state where incentive pricing was being conducted. (Tr. at 26). Accordingly, plaintiff avers that Tennessee's affirmation statute keeps the price of many slow selling goods artifically high. (Tr. at 28). In gist, plaintiff asserts that the affirmation statute distorts the market forces of supply and demand, prevents the use of aggressive price promotion as a marketing tool to attain profit maximization and also impairs the ability to introduce new products in other states. Plaintiff maintains that the most effective way to successfully introduce a product into a new market is through a price reduction, and although a reduction often is not necessary in Tennessee, it is unavoidable under Tennessee's affirmation statute. (Tr. at 25-26).

The Commission asserts that price discounting is currently available to the plaintiff, through plaintiff's 77-17 promotional allowance program. Under this program, the plaintiff provides unconditional lump sum payments to wholesalers. (Tr. at 21-22). The goal of these payments is the promotion of plaintiff's goods through either advertising or price promotion. (Tr. at 99). Such a program

is not in violation of Tennessee's affirmation statute since they must be made without conditions on how the wholesaler utilizes the funds and, thus, any eventual price reductions are entirely discretionary by the wholesalers.

Brown-Forman contends that the 77-17 program has been very ineffective in marketing plaintiff's brands since the payment cannot be brand specific and since Brown-Forman cannot require the wholesaler to use its funds on its products or require the wholesaler to document and report how the funds are spent. Further, plaintiff notes that even if the wholesaler uses this money to promote Brown-Forman brands, there is no guarantee that the wholesaler will promote the particular brands that plaintiff wishes to promote, or that the designated brands will be promoted at times that coincide with other promotional programs emphasizing particular Brown-Forman brands. (Tr. at 21-22, 83, 98). As a result, plaintiff contends that the 77-17 program is a very inefficient way to promote Brown-Forman products. (Tr. at 127).

LEGAL CONCLUSION

As previously noted, there have been no enforcement actions taken by the Commissioner for violation of Tennessee's affirmation statute nor has the Commission promulgated any interpretative rules or regulations in regard to the statute. As a result, the issue before the Court is whether the affirmation statute, on its face, violates the Commerce Clause of the United States Constiution. The Court holds that the statute in question is facially unconstitutional because of its effect on interstate commerce.

The Supreme Court has adopted a two-tiered approach to analyzing issues concerning the legitimacy of economic

regulation under the Commerce Clause. If the state statute in question directly regulates or discriminates against interstate commerce, or if the effect of the statute works to favor in-state economic interests over out-of-state interests, then the Supreme Court has generally struck down the statute without additional inquiry. *Brown-Forman Distillers Corp v. New York State Liquor Authority*, 106 S.Ct. 2080, 2084 (1986); *Philadelphia v. New Jersey*, 437 U.S. 617, 628, 98 S.Ct. 2531, 2537 (1978); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 201, 45 S.Ct. 486 (1925). If the statute has only indirect effects on interstate commerce, however, and regulates evenhandedly, then the reviewing court must scrutinize the legitimacy of the state's interest and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970). In distinguishing the two approaches, the salient issue is the overall effect the statute has on both local and interstate activity. 106 S.Ct. at 2084.

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254 (1966), the Supreme Court first considered the constitutionality of an affirmation statute. The New York affirmation statute at issue in *Seagram* was "retrospective" in nature in that it required manufacturers to affirm to state authorities that the prices they charged in New York for alcoholic beverages during a given month were not higher than the lowest price charged in any other state during the preceding month. 86 S.Ct. at 1258. The Court upheld the statute, concluding that the "serious discriminatory effects of [the statute] alleged by appellants on their business outside New York are largely matters of conjecture." 86 S.Ct. at 1254. However, the Court stated that it would be willing to re-examine the issue when they

had enough time to assess the long-term extraterritorial effects of the statute, thus eliminating the "conjecture" of whether the regulatory scheme constituted an interference with the Commerce Clause. *Id.*

It was not until the *Brown-Forman Distillers* case, 106 S.Ct. 2080 ("Brown-Forman"), that the Supreme Court substantively examined the extraterritorial effects of an affirmation statute. The statute being questioned in that case was "prospective" in nature, in that it required an alcoholic beverage manufacturer to post a schedule of prices, that would be charged New York wholesalers, to be effective on the first day of the second following month and affirm that the price of liquor in the posted schedule would be no higher than the lowest price a comparable item would be sold anywhere in the United States during the month the schedule went into effect. *Id.* at 2083.

In keeping with its concern about the statutes effect on other states, the *Brown-Forman* Court explained that while New York could regulate the sale of liquor within its borders, and could legitimately seek low prices for its residents, it could not project its legislation into another state by regulating the price to be paid for liquors in that other state. *Id.* at 2086; *See also Baldwin v. G.A.F Seelig, Inc.*, 294 U.S. 511, 521, 55 S.Ct. 497, 499 (1935). Once more elaborating its concern about the *effect* affirmation statutes have on the liquor market in other states, the Court noted that the fact the New York law addressed only sales of liquor in New York was "irrelevant if the practical effect of the law [was] to control liquor prices in other States." 106 S.Ct. at 2086. Accordingly, the Court found that a "prospective" statute, such as New York's in *Brown-Forman*, regulated out-of-state transactions in violation of

the Commerce Clause. *See also United States Brewers' Ass'n v. Healy.* 692 F.2d 275 (2d Cir. 1982), *aff'd,* 104 S.Ct. 265 (the Second Circuit struck down Connecticut's "prospective" affirmation statute similar to the New York Statute).

The Commission correctly notes that the Supreme Court in *Brown-Forman* did not specifically overrule its earlier decision in *Seagram,* in which it sustained the facial constitutionality of New York's predecessor affirmation law. It is true that the *Seagram* Court in justifying its decesion stated that "[t]he mere fact that [the statute] is geared to appellant's pricing policies in other states is not sufficient to invalidate the statute." 86 S.Ct. at 1260. It is also true that Tennessee's affirmation statute is neither prospective nor retrospective, but "contemporaneous" in that a supplier must affirm that its prices are no higher that [sic] its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler. Thus, theoretically, once a supplier has made its sale to a Tennessee wholesaler, it is free to alter its pricing policies in wholesale liquor transactions in other states as it chooses. The language of the Supreme Court in *Brown-Forman,* however, eschews such theoretical conjecturing and, instead, consistently states that the "practical effect" of the questioned statute is the touchstone for determining its validity. The Supreme Court in *Brown-Forman* readily notes that its reasoning in striking down the affirmation statute might undermine the *Seagram* holding and that, arguably, the contested statutes were similar. 106 S.Ct. at 2087 n.6. This Court need not act as arbitrator in resolving the Supreme Court's quandary. Perhaps Seagram is a "relic of the past" as suggested by Justice Blackmun in his concurring opinion. 106 S.Ct. at 2088.

What is clear to this Court is that the "practical effect" of Tennessee's affirmation statute, as currently set forth, is to control the prices of Brown-Forman products in other states. It is clear that if a liquor distiller, such as plaintiff, desires to raise its prices in Tennessee, it must raise its price first in every other state in which the product is sold. Tennessee's affirmation statute works to deny consumers in other states the benefits of a free competitive market and the availability of the 77-17 promotional allowance program or of quantity discounts fails to offset the extraterritorial effect of Tennessee's projected legislation.

Defendants also contend that the affirmation statute is a valid exercise of a state's power to regulate intoxicating liquors pursuant to the Twenty-First Amendment to the United States Constitution. It is well settled, however, that the Twenty-First Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause. 106 S.Ct. at 2087; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275, 104 S.Ct. 3049, 3057 (1984). Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution and, accordingly, each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298 (1964). The Twenty-First Amendment empowers Tennessee with only the authority to control sales of liquor in Tennessee, not in other states, and the Commerce Clause becomes offended when one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in another state. 106 S.Ct. at 2088. Further, state laws that constitute mere economic protectionism are not entitled to the same defer-

ence as laws enacted to combat the perceived evils of unrestricted traffic of alcoholic beverages. 104 S.Ct. at 3058. Accordingly, the Court rejects the defendant's reliance on the Amendment and finds that Tennessee's affirmation statute violates the Commerce Clause of the United States Constitution and defendants are hereby permanently enjoined from enforcing Tenn. Code Ann. § 57-3-202(e). An Order will be entered simultaneously with this Memorandum.

This the 30th day of June, 1987.

/s/ JOHN J. NIXON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

Docket No. 3-86-0926

BROWN-FORMAN CORPORATION

vs.

THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, ET AL.

ORDER

In accordance with the contemporaneously entered Memorandum, the Court hereby finds Tenn. Code Ann. § 57-3-202(e) to be in violation of the United States Constitution and, accordingly, the Tennessee Alcoholic Beverage Commisson is permanently enjoined from enforcing this statute.

Entered this the 30th day of June, 1987.

/s/ JOHN J. NIXON

UNITED STATES DISTRICT JUDGE

Tenn. Code Ann. § 57-3-202(e)

(1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;

(2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverage of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.

(3) "Price" as used in this subsection shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's distiller's, rectifier's factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities;

(4) Any person, firm or corporate official who makes a false statement in any affirmation filed hereunder shall be guilty of a misdemeanor and shall be punished by a fine

or not more than one thousand dollars ($1,000) and by imprisonment for not more than six (6) months. Every affirmation filed hereunder shall be deemed to have been made in each county in Tennessee where alcoholic spirituous beverages or vintage alcoholic beverages are legally offered for sale;

(5) Any manufacturer, distiller, rectifier, factor, broker, or vintner, who fails to file such affirmation or willfully violates the pledges contained therein shall have its license and privileges to import and sell alcoholic spirituous beverages or vintage alcoholic beverages in the state refused, revoked or suspended by the alcoholic beverage commission for a period of not less than one (1) year;

(6) For the purpose of carrying out the provisions of this subsection, each licensed manufacturer, distiller, rectifier, factor, broker or vintner in the state of Tennessee offering for sale to any licensed wholesaler or distributor in the State of Tennessee any any brand of alcoholic spiritious beverages or vintage alcoholic beverages shall file the affirmation as herein provided with the alcoholic beverage commission not later than sixty (60) days after May 13, 1975, and thereafter shall file the same in accordance with the provisions as contained in subsection (e)(1), and other pertinent statutes.

Supreme Court, U.S.
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No. 88-1282

In The

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LICENSED BEVERAGE WHOLESALERS OF TENNESSEE

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QUESTION PRESENTED

On March 28, 1989, this Court will hear argument addressed to the constitutionality of the Connecticut beer price affirmation scheme.[1] Tenn. Code Ann. § 57-3-202(e), which provides that wine and distilled spirits cannot be sold in Tennessee unless the supplier affirms that the price in Tennessee is no higher than that charged in other states, constitutes little more than a statutory policy statement. Tennessee does not require price posting; that the affirmed price remain in effect for any fixed time; or prior notice, or regulatory approval of price changes. Tennessee simply insists that prices in Tennessee be no higher than those offered in other states. As such, unlike the Connecticut law, Tennessee's statute does not conflict with the regulatory schemes in other states, subjecting suppliers to inconsistent regulations.

Did the Sixth Circuit correctly conclude that Tennessee's affirmation statute does not violate the Commerce Clause because it neither discriminates against interstate commerce nor subjects Brown-Forman to inconsistent regulations?

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[1] *The Beer Institute v. Healy*, 849 F.2d 757 (2d Cir. 1988), *prob. juris. noted*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (Nos. 88-449 and 88-513) (*"Healy II"*).

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No. 88-1282

In The

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October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT LICENSED BEVERAGE WHOLESALERS OF TENNESSEE

The respondent, Licensed Beverage Wholesalers of Tennessee,[2] respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 860 F.2d 1354.

[2] The Licensed Beverage Wholesalers of Tennessee ("LBWT") is a trade association that has no parent companies, subsidiaries or affiliates. (Sup.Ct.R. 28.1).

The respondent does not dispute petitioner's description of the Parties; Opinions Below; Jurisdiction; or the Constitutional Provisions and Statute.

STATEMENT OF THE CASE

Petitioner ("Brown-Forman"), a Tennessee corporation with annual gross revenues in excess of one billion dollars (Rec. 6, 153),[3] sells distilled spirits and wines in interstate commerce to control states[4] and to independent wholesalers in more than thirty states, including Tennessee.[5] In the control states, Brown-Forman has entered into contracts that, in effect, establish a price for Brown-Forman products nationwide for periods up to ninety days. These contracts further constrain petitioner's ability to make price adjustments indirectly by defining "price" to include all allowances and rebates paid in any state. (Rec. 116-17, 132).

In 1975, Tenn. Code Ann. § 57-3-202(e) was enacted, requiring suppliers, as a condition of doing business in Tennessee, to affirm that the price of wine and distilled

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[3] "Rec. ___" references are to the portions of the record on appeal contained in the joint appendix filed with the Sixth Circuit.

[4] The "control" or "monopoly" states themselves conduct the wholesale and/or retail distribution of wine and spirits. These states are immune from Commerce Clause restraints as market participants. *See, e.g., White v. Massachusetts Council of Construction Employers*, 406 U.S. 204, 206-07, 214-15 (1983).

[5] The wholesalers are extremely small compared to major suppliers, like Brown-Forman. (Rec. 236-37). While wholesalers have input in marketing decisions, most pricing and marketing strategies are dictated by the suppliers. (Rec. 239).

spirits to Tennessee wholesalers is no higher than the price offered to wholesalers in other states. § 57-3-202(e)(1). This statute does not require price posting; prior notice, or regulatory approval of price changes; or that the affirmed price be maintained for a certain fixed time. "Price" is defined to include FOB price, and does not include price differentials based on transportation costs; containers; costs not directly attributable to the quality and proof of the product; and quantity discounts. § 57-3-202(e)(3). When enacted, the only effect of the affirmation statute in Tennessee was to reduce prices on some brands. (Rec. 239-40).

Following this Court's decision in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[6] petitioner filed a number of actions challenging affirmation statutes.[7] In Tennessee, Brown-Forman sought a declaratory judgment that Tenn. Code Ann. § 57-3-202(e) was violative of the Commerce Clause. Unlike the events giving rise to the decision in *Brown-Forman*,[8] this action was not precipitated by threatened administrative action or alleged conflict between state regulations. Rather, petitioner simply withdrew its affirmation claiming that the *Brown-Forman* decision rendered all affirmation statutes unconstitutional to the extent that such statutes skew the forces of supply and demand across the country.

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[6] 476 U.S. 573, 106 S.Ct. 2080 (1986).

[7] *See* Petition for Writ of Certiorari at 21 n. 10, 22 n. 11 (citing cases).

[8] 106 S.Ct. at 2083-84.

While petitioner's sole claim was that Tennessee's statute distorts market forces, at trial, Brown-Forman admitted that its contracts with the control states were much more burdensome than Tennessee's affirmation statute and that those contracts, unlike the Tennessee statute, effectively established a nationwide price for up to ninety days. (Rec. 116-17, 132). The only evidence offered by Brown-Forman in support of its challenge showed that there are regional variations in the demand for its products. Given these regional variations, Brown-Forman argued that it could not make price reductions to increase demand in one part of the country without making corresponding reductions in Tennessee. Conversely, Brown-Forman argued that it could not increase prices in Tennessee to maximize profits without making corresponding price increases around the country.

Petitioner's challenge to the findings of the Sixth Circuit on the alleged extraterritorial impact of the Tennessee statute is surprising since Brown-Forman chose not to introduce economic data in its possession that was directly relevant to this claim. This information was compiled by Brown-Forman in connection with the promotional allowance paid by Brown-Forman to the wholesalers that distribute its products.[9]

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[9] In *Brown-Forman*, 106 S.Ct. at 2083 & n. 2, the promotional allowance used both in New York and in other states was deemed by the New York Liquor Authority to violate its affirmation law. While no such issue is raised in Tennessee, it is noteworthy that this Court observed that these amounts were to be used for "advertising" and that the amount of the allowance "is not tied to the quantity either of the wholesaler's advertising or its purchases of appellant's product." *Id.*

The promotional allowance paid by Brown-Forman to its wholesalers is determined in annual meetings between Brown-Forman and each wholesaler. (Rec. 245-46). In those meetings, past sales records are reviewed, along with market goals and competitors' prices on a brand-by-brand basis. (Rec. 246-53). The parties also discuss the ways each brand is to be promoted during the following year, including price reductions. (Rec. 261-64). The sum of the promotional allowance established for each brand equals the lump sum payment to each wholesaler. The wholesalers keep monthly records of the promotional dollars spent on each brand, including amounts used for price reduction. (Rec. 360-62). All of this information is reported to Brown-Forman and, at the end of the year, it is used in setting the price for each brand for the following year. (Rec. 189-90). After the price for each brand is established, the records are destroyed and the process begins again.[10]

Based solely upon the evidence that there are regional variations in the demand for Brown-Forman's products, the district court held that it was clear that the practical effect of the Tennessee affirmation statute was to "control" the prices of Brown-Forman products in other states. (Rec. 322). The Sixth Circuit reversed, finding the evidence for from clear:

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[10] Throughout the early part of the trial, Brown-Forman's Executive Director of Sales and its Senior Attorney and Assistant Secretary testified repeatedly that it was impossible to determine the effectiveness of the promotional allowance in making price adjustments because petitioner kept no records. (Rec. 107-08; 139; 142-43; 169-70; 180-81; 182-83; 191-92; 194; 217).

> The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remains unknown.[11]

Despite Brown-Forman's failure to quantify the alleged market distortions, the Sixth Circuit presumed that the price elasticity of demand varied significantly in different parts of the country.[12] Based on this assumption, the question addressed by the Sixth Circuit was whether the presumed tendency of the Tennessee statute to affect Brown-Forman's pricing policy constituted impermissible *regulation* of commerce in other states.[13]

The Sixth Circuit held that the presumed extraterritorial repercussions of Tennessee's statute were not violative of the Commerce Clause for three reasons. First, in *Brown-Forman* the New York scheme was held violative of the Commerce Clause because the New York regulations conflicted directly with the regulatory schemes in other states, not because of the "tendency of the [New York] statute to discourage pricing changes." Since petitioner did not allege such a conflict between the regulations in Tennessee and those in other states, the Sixth Circuit

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[11] 840 F.2d at 1358.

[12] *Id.*

[13] *Id.* at 1359.

concluded that the mere tendency to affect pricing decisions was not the kind of extraterritorial *regulation* proscribed by this Court.[14]

Second, in *Seagram*,[15] this Court expressly held that a state *"may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country."*[16] The Sixth Circuit concluded that if assuring low prices is a permissible objective, *a fortiori*, Tennessee's statute, aimed solely at this end did not by virtue of this purpose alone impermissibly regulate out-of-state transactions.[17]

Third, the Sixth Circuit noted that, as in *Seagram*, the claims by Brown-Forman that the Tennessee statute adversely affected consumer prices were "largely matters of conjecture."[18] Given petitioner's speculative claims and the fact that, "[o]n its face, the Tennessee statute seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*," the

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[14] In its petition, Brown-Forman attempts to characterize this Court's earlier decision as being based on notions of consumer protection. 106 S.Ct. at 2085 (state may not insist that consumers in other states surrender competitive advantage). Petitioner is in error for two reasons. First, if, as *Seagram* held, a state may constitutionally seek lower prices, there is an implicit approval of the inevitable extraterritorial effect of such a policy. Second, the *Brown-Forman* decision was based on the regulatory conflict caused by New York law, not the protectionist effect.

[15] *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 43 (1966).

[16] 860 F.2d at 1360. (Emphasis original).

[17] *Id.*

[18] *Id.* at 1358, 1360.

Sixth Circuit concluded that so long as *Seagram* remained the law, it was bound to follow it.[19]

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit's Decision That Tennessee's Affirmation Statute Neither Discriminates Against Interstate Commerce Nor Subjects Brown-Forman To Conflicting Regulations Is Consistent With The Decisions Of This Court.

Contrary to the argument of petitioner, the Commerce Clause has never been viewed by this Court as a vehicle to evaluate the economic wisdom of state legislation under the guise of assessing the extraterritorial repercussions of the legitimate exercise of state powers.[20] Many of the inherent powers exercised by the states necessarily affect interstate commerce.[21] The Commerce Clause only prohibits states from discriminating against interstate commerce[22] and from regulating transactions beyond their borders.[23]

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[19] *Id.* at 1361.

[20] *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. ___, 107 S.Ct. 1637, 1653 (1987) (Scalia, J., concurring); *cf. Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (due process).

[21] *See CTS Corp.*, 107 S.Ct. at 1650; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

[22] *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-53 (1977).

[23] *See, e.g., Edgar Corp. v. MITE Corp.*, 457 U.S. 624, 642 (1982); *Kassel v. Consolidated Freightways*, 450 U.S. 662, 671 (1981).

When Congress so chooses, it may exempt state action from challenge under the Commerce Clause.[24] This Court has held, however, that the Twenty-first Amendment, unlike acts of Congress committing business regulation to the states, does not completely exempt state liquor regulation from Commerce Clause constraints.[25] While this Court's Twenty-first Amendment decisions are difficult to characterize as a whole, in the area of price affirmation, this Court has accorded the states substantial deference. LBWT submits that in the area of price affirmation, it is indisputable that this Court has resolved the issues raised by petitioner in precisely the same manner as the Sixth Circuit.

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[24] *See Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*, 472 U.S. 159, 174-75 (1985) (Bank Holding Company Act of 1956, § 3(d), as amended, 12 U.S.C. § 1842(d)); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981) (McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*).

[25] *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 726-27 (1987); *California Retail Liquor Dealers Ass'n v. MidCal*, 445 U.S. 97, 109-10 (1980).

This Court's initial decisions under the Twenty-first Amendment accorded the states almost unqualified power. *See, e.g., State Bd. of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 62 (1936). The widely-varied contexts in which this Court's recent decisions have addressed the scope of the power conferred by the Twenty-first Amendment make categorical statements about the scope of the amendment impossible. *See, e.g., 324 Liquor Corp.*, 107 S.Ct. at 730 (O'Connor, J., dissenting) (Twenty-first Amendment virtually a dead letter).

This Court first visited affirmation in *Joseph E. Seagram & Sons, Inc. v. Hostetter*.[26] At that time, New York's affirmation law was retroactive, requiring the supplier to warrant that its price in New York was no higher than the lowest price offered in other states in the preceding month.[27] The statute also required suppliers to post the affirmed price and to maintain that price for a month.[28] Changes in affirmed prices could not be made without prior written administrative approval.[29] "Price" was defined to include all rebates, allowances, free goods and inducements of any kind.[30]

In rejecting Seagram's facial Commerce Clause challenge, this Court held that,

> the mere fact that [the state law] is geared to . . . pricing policies in other states is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.[31]

In holding that the states may constitutionally insist that their wholesalers receive liquor at prices as low as offered in other parts of the country, this Court emphasized that while such a policy could affect market forces,

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[26] 384 U.S. 35 (1966).

[27] *Id.* at 39-40.

[28] *Id.*

[29] *Id.* at 53.

[30] *Id.* at 57.

[31] *Id.* at 43. The Court also held that this goal did not violate the Due Process Clause. *Id.* at 47.

evidence of such an effect had not been presented. Further, this Court observed that even if such evidence had been proffered, "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."[32]

In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[33] this Court again addressed a challenge to New York's affirmation law.[34] Unlike the facial challenge raised in *Seagram*, however, *Brown-Forman* was precipitated by an administrative action commenced against the supplier because Brown-Forman had used a promotional allowance authorized in other states, allegedly in violation of its New York price affirmation. In holding the New York statute violative of the Commerce Clause, this Court emphasized that New York's regulatory scheme effectively forced Brown-Forman to abandon the promotional allowance in states in which the program was legal or forced other states to modify their regulatory

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[32] *Id.* at 43. *Accord United States Brewers Ass'n v. Healy*, 692 F.2d 275, 283-84 (2d Cir. 1982), *aff'd mem.*, 464 U.S. 909 (1983).

[33] 476 U.S. 573, 106 S.Ct. 2080 (1986).

[34] While the New York affirmation scheme had been amended after *Seagram*, it was in most respects the same. The statute required price posting; it required that the posted price be maintained for a period of one month; it required notice and regulatory approval of price changes; and it defined "price" in detail. The only material difference in the two schemes was the period covered by the affirmation.

schemes.[35] This extraterritorial *regulation* not only subjected Brown-Forman to inconsistent obligations, but interfered with the Twenty-first Amendment power of other states.[36]

Petitioner claims that the Sixth Circuit erred in upholding the Tennessee statute because *Brown-Forman* expressly refused to attach constitutional significance to the difference between prospective statutes, like the one before it, and retroactive statutes, as in *Seagram*. From this proposition, petitioner argues that the principles in *Brown-Forman* are not limited to prospective statutes, but apply to all affirmation statutes. One of these principles, according to petitioner, is that *Brown-Forman* struck the New York statute because of its effect on consumers. Thus, argues petitioner, the Sixth Circuit erred by not according the alleged extraterritiorial impact of Tennessee's statute on consumer prices controlling weight.

LBWT disagrees. It is clear, as petitioner states, that the principles announced in *Seagram* and *Brown-Forman* do not turn principally on whether the affirmation statute is prospective or retrospective. As such, LBWT also agrees that both cases address standards to be applied to all affirmation statutes, whether denominated as retroactive, contemporaneous or prospective.

LBWT does not agree, however, that the *Brown-Forman* decision was aimed at consumer injury. The *Brown-Forman* decision was based on the New York statute's subjecting suppliers to inconsistent and conflicting regulatory obligations.

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[35] *Id.* at 2086-87.

[36] *Id.* at 2088.

Petitioner also criticizes the Sixth Circuit for refusing to weigh the alleged extraterritorial impact on consumer prices. Setting aside that the Commerce Clause does not proscribe state legislation simply because effects occur outside the state's borders and that this Court has expressly approved the objective of seeking lower liquor prices, Brown-Forman introduced no evidence to support its claim. In fact, it had compiled information on the issue, but destroyed it. (Rec. 194-95).

This failure to introduce evidence on the effects of affirmation is compounded by Brown-Forman's acknowledgment that its contractual obligations in the control states were substantially more burdensome than the Tennessee law. Thus, Brown-Forman refused to introduce evidence of economic injury in a case in which it admitted that its inability to change prices was caused by contractual obligations in other states. Under such circumstances, the Sixth Circuit's refusal to strike presumptively valid state legislation based on petitioner's unsubstantiated, if not completely hypothetical claims was not error, but responsible decisionmaking.

II.

The Decision Of The Sixth Circuit And The Decision Of The Second Circuit In *Healy II* Are Not Inconsistent.

In *The Beer Institute v. Healy*,[37] the Second Circuit held the Connecticut beer affirmation statute violative of the Commerce Clause because its "purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders."[38] As the Sixth Circuit explained, its decision is not necessarily inconsistent

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[37] 849 F.2d 757.

[38] *Id.* at 759, 760-61.

with *Healy II* because, unlike the Connecticut statute, the Tennessee statute does not present the issue of conflict with regulations in other states. To the contrary, Tennessee's statute "simply requires that a distiller set its Tennessee prices at the lowest level it chooses to set in other states."[39]

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[39] 860 F.2d at 1361.

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No. 88-1282

In The

Supreme Court of the United States

October Term, 1988

BROWN-FORMAN CORPORATION,

Petitioner,

v.

TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

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QUESTION PRESENTED

Tennessee's contemporaneous price affirmation statute, Tenn. Code Ann. § 57-3-202(e), requires suppliers of alcoholic beverages to affirm that their prices, at the time of their sale to a Tennessee wholesaler, are no higher than the prices the suppliers are offering to wholesalers elsewhere at that time. Tennessee has no price posting requirement. Both before and after a supplier has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states, without any regulatory approval by or prior notice to the Tennessee Alcoholic Beverage Commission. Tennessee's affirmation law defines the affirmed "price" to exclude any differentials in price to Tennessee wholesalers and non-Tennessee wholesalers resulting from differences in cost not directly related to the quality and proof of the product, or from equally offered discounts based upon quantity purchases.

Did the Sixth Circuit correctly conclude (1) that the State of Tennessee, in the exercise of its Twenty-first Amendment powers to regulate intoxicating liquors, may constitutionally insist on liquor prices to domestic wholesalers as low as prices offered elsewhere in the country, and (2) that § 57-3-202(e) does not violate the Commerce Clause of the United States Constitution, because it does not directly regulate or discriminate against interstate commerce?

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No. 88-1282

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BROWN-FORMAN CORPORATION,

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TENNESSEE ALCOHOLIC BEVERAGE COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

Respondent Tennessee Alcoholic Beverage Commission, its members and its director (hereinafter collectively referred to as "the Commission"), respectfully request this Court to deny Brown-Forman Corporation's petition for a writ of certiorari for review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. That decision is reported as *Brown-Forman Corp.*

v. Tennessee Alcoholic Beverage Comm'n, 860 F.2d 1354 (6th Cir. 1988).

The Commission does not dispute petitioner's description of the Parties; Opinions Below; Jurisdiction; or the Constitutional Provisions and Statute, with the exception to its abbreviated citation to Tenn. Code Ann. § 57-3-202(e), which the Commission submits in full.

CONSTITUTIONAL PROVISIONS AND STATUTE

Tenn. Code Ann. § 57-3-202(e) provides as follows:

> (1) Every manufacturer, distiller, rectifier, factor, broker, or vintner of alcoholic spirituous beverages or vintage alcoholic beverages shall, before offering for sale to any licensed wholesaler or distributor in the state of Tennessee any brand of alcoholic spirituous beverage or vintage alcoholic beverages, file with the alcoholic beverage commission an affirmation of corporate policy with regard to sales of all brands owned, controlled, sold, offered for sale, franchised or distributed by such manufacturer, distiller, rectifier, factor, broker or vintner in this state;
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> (2) The affirmation shall certify that the manufacturer, distiller, rectifier, factor, broker or vintner shall not willfully sell or offer for sale any alcoholic spirituous beverage or vintage alcoholic beverages of a particular brand, proof or size, in Tennessee at a price higher than the price such liquors are sold or offered for sale to licensed wholesalers in any other state in the United States.
>
> (3) "Price" as used in this subsection shall mean platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity

discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's, distiller's, rectifier's, factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities;

(4) Any person, firm or corporate official who makes a false statement in any affirmation filed hereunder shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) and by imprisonment for not more than six (6) months. Every affirmation filed hereunder shall be deemed to have been made in each county in Tennessee where alcoholic spirituous beverages or vintage alcoholic beverages are legally offered for sale;

(5) Any manufacturer, distiller, rectifier, factor, broker, or vintner, who fails to file such affirmation or willfully violates the pledges contained therein shall have its license and privileges to import and sell alcoholic spirituous beverages or vintage alcoholic beverages in the state refused, revoked or suspended by the alcoholic beverage commission for a period of not less than one (1) year;

(6) For the purpose of carrying out the provisions of this subsection, each licensed manufacturer, distiller, rectifier, factor, broker or vintner in the state of Tennessee offering for sale to any licensed wholesaler or distributor in the State of Tennessee any brand of alcoholic spirituous beverages or vintage alcoholic beverages shall file the affirmation as herein provided with the alcoholic beverage commission not later than sixty (60) days after May 13, 1975, and thereafter shall file the same in accordance with the provisions as contained in subsection (e)(1), and other pertinent statutes.

STATEMENT OF THE CASE

Brown-Forman Corporation (hereinafter "petitioner"), is a Tennessee corporation engaged in the importation, manufacture, sale and distribution of alcoholic beverages. It manufactures one of its brands in Tennessee and imports other brands into the state. It distributes those same brands in states other than Tennessee. (Rec. 6).[1]

Tennessee is one of several states that require alcoholic beverage price affirmation. The states engage in price affirmation in two ways. States which license the wholesale and retail sale of alcoholic beverages, such as Tennessee, address affirmation through statutory provisions. Other states, referred to as "monopoly" or "control" states, because they purchase all of the alcoholic beverages distributed and sold within their borders, utilize affirmation practices through their contracts with suppliers of alcoholic beverages. (Rec. 36, 114-15, 125-26, 130-36, 187).

Tennessee's affirmation statute, Tenn. Code Ann. § 57-3-202(e), was enacted in 1975. See 1975 Tenn. Pub. Acts, ch. 234. It is part of the comprehensive state statutory scheme regulating virtually all aspects of the manufacture, importation, distribution and sale of alcoholic beverages in the State of Tennessee. *See* Tenn. Code §§ 57-1-101 to -10-102. The purpose of this law is to

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[1] References to "Rec." refer to portions of the appellate record contained in the three volume Joint Appendix filed with the Sixth Circuit.

prevent petitioner and other suppliers of alcoholic beverages from discriminating in price in their sales to Tennessee wholesalers and wholesalers in other states for products of the same quality and proof. (Rec. 36).

On October 30, 1986, petitioner filed this declaratory judgment action against the Commission challenging the constitutionality of Tenn. Code Ann. § 57-3-202(e). (Rec. 6). Prior to initiating this lawsuit, petitioner withdrew the affirmation statement it had filed with the Commission. (Rec. 9-10). Before petitioner's withdrawal of its affirmation, there had been no violations of the state affirmation law. Accordingly, there have been no enforcement actions by the Commission. In addition, the Commission has not promulgated any interpretive rules or regulations with regard to this law. (Rec. 228-29).

In withdrawing its affirmation and in seeking a declaratory judgment, petitioner relied upon the decision of this Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), which held that the State of New York's liquor price affirmation statute was facially unconstitutional. (Rec. 10). The New York law struck down in *Brown-Forman* was "prospective" in operation, requiring all distillers of alcoholic beverages to post a schedule, before the 25th day of each month, listing their wholesale prices in New York, to be effective the second following month. At the time the schedules were filed, the distillers were also required to file an affirmation that their posted prices for New York would be no higher than the lowest prices at which the distillers would sell liquor, during the effective month, to wholesalers in any other state. 476 U.S. at 575-76.

The *Brown-Forman* decision did not overrule the earlier holding of the Court in *Joseph E. Seagram and Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), which upheld the facial constitutionality of New York's predecessor liquor affirmation law. That law was "retrospective" in operation, requiring suppliers to affirm that their prices to New York wholesalers were no higher than their wholesale prices in other states during the month immediately preceeding the suppliers sale in New York. 384 U.S. at 39-40.

Tennessee's affirmation statute is neither prospective nor retrospective in operation, but rather uses a "contemporaneous" time period as the reference point for the lowest or affirmed price. Tennessee's contemporaneous affirmation requirement means that a supplier must affirm that its prices to a domestic wholesaler are no higher than its prices elsewhere at the very time of the supplier's sale to a Tennessee wholesaler. (Rec. 38-39).

During the trial of this matter, petitioner presented evidence that, in the course of its business, it keeps records referred to as depletion flash reports. These reports are prepared based upon information supplied by the wholesalers and the control states about their sales of petitioner's products. The reports contain information, sorted by state and brand, of total sales and sales to date for petitioner's current and immediate past fiscal years. The reports also contain what is referred to as a quota number, which is the number of sales petitioner is seeking for each of its brands. Finally, the reports indicate the percentage of quota attained in sales to date. (Rec. 95-101; 330).

Petitioner contends that these depletion flash reports are an accurate reflection of demand for its various products. These reports show differing demands for certain of petitioner's products in certain states. (Rec. 104-05). The depletion flash reports are not based upon sales of petitioner's products per capita. (Rec. 141-42). Moreover, the depletion flash reports do not reflect the extent, or even the existence, of any discounting or promotional activities, which the wholesalers may be doing. It was acknowledged that these reports do not even indicate what causes an increase or decrease in sales of petitioner's products. (Rec. 200-01).

Tennessee's affirmation law requires that a supplier's "platform price at the distillery," at the time of its sale to a Tennessee wholesaler, be no higher than its platform price to wholesalers in other states at that time. (Rec. 35, 232-33). The definition of the affirmed "price" in § 57-3-202(e)(3) expressly provides that valid price variations can result from differences in transportation costs, container costs or any other costs not directly related to the quality and proof of the product. (Rec. 35, 149-50).

This law also specifically provides that variations in price can result from discounts based upon quantity purchases. (Rec. 35, 120). Petitioner acknowledged that, under this law, a Tennessee wholesaler would pay a higher price to a supplier than the price paid by a wholesaler in another state, where a quantity discount was offered by the supplier, and the out-of-state wholesaler took advantage of the discount, and the Tennessee wholesaler did not. (Rec. 169).

The definition of "price" in Tennessee's affirmation law contrasts dramatically with the definition of "price" in the New York affirmation law held unconstitutional in *Brown-Forman*. That law required all discounts or allowances offered to wholesalers in other states to be reflected in the New York affirmed price. (Rec. 166, 179). Some of the control states, in their contractual warranties, also require petitioner's price to the control state to reflect all discounts and allowances petitioner offers to wholesalers elsewhere. According to petitioner, the terms and conditions of the control state warranties are generally broader and more "onerous" that the state affirmation laws. (Rec. 132).

Petitioner claims that affirmation in Tennessee has resulted in millions of dollars in losses. Petitioner has not, however, quantified any monetary losses that affirmation in Tennessee has caused it. (Rec. 165). Petitioner is one of the two or three most profitable corporations in the alcoholic beverages industry, and has had gross revenues in excess of $1 billion, with an overall increase in sales of 12.2%. Petitioner is the third largest factor in the alcoholic beverages market, and with Seagrams and Allied-Lyons, controls a substantial share of this market. (Rec. 153-54, 164).

Petitioner is currently able to provide money to its wholesalers both within and without Tennessee, which is used for discounting its products, through its 77-17 promotional allowance program. (Rec. 172). Petitioner intends for the wholesalers to use these monies to promote its products. (Rec. 172). Although the promotional allowance that each wholesaler receives is not tied to the

amount either of the wholesaler's advertising or purchases of petitioner's products, the allowance is based upon the wholesaler's past purchases and projection of future purchases. (Rec. 157).

Petitioner was prohibited from offering its 77-17 promotional allowance to wholesalers in the State of New York, yet that state's affirmation statute required that the allowance offered to wholesalers in other states be reflected in the New York affirmed price. (Rec. 166-67). Petitioner is and has been providing its 77-17 promotional allowance to Tennessee wholesalers for quite some time. (Rec. 188). Petitioner's promotional allowance is not prohibited under Tennessee's affirmation law. (Rec. 232).

The testimony and records of petitioner's Off-Premises Manager for Wine in the states of Tennessee, Arkansas and Kentucky, reveal that information on the use of the promotional allowance is voluntarily provided by wholesalers as to each specific brand of petitioner's products they sell. (Rec. 259-61, 353). This information indicated that petitioner's 77-17 allowance was used by wholesalers to discount petitioner's products. (Rec. 287-89, 353).

The district court, relying primarily on the proof presented at trial that the demand for petitioner's products varies regionally, held that § 57-3-202(e) directly regulated interstate commerce in violation of the Commerce Clause, because the "practical effect" of the law was to control the prices of Brown-Forman's products in other states. (Rec. 322). The court further held that because the statute directly regulated interstate commerce, it could not be saved from invalidation by virtue

of the State's power to regulate intoxicating liquors under the Twenty-first Amendment to the United States Constitution. (Rec. 323).

On appeal, the Sixth Circuit reversed. *Brown-Forman Corp. v. Tennessee Alcoholic Beverage Comm'n*, 860 F.2d 1354 (6th Cir. 1988). In its review of § 57-3-202(e), the court acknowledged that the "price elasticity of demand for different types of liquor varies significantly in different parts of the country" and as such Tennessee's affirmation requirement of equally low prices could result in "distortions" in the interstate liquor market. The court noted, however, that:

> The evidence presented by Brown-Forman did not quantify the market distortions attributed to the Tennessee statute. In terms of dollars and cents, both the practical effect of the statute on Brown-Forman's bottom line and the practical effect of the statute on the pocketbooks of consumers within and without the state remains unknown.

860 F.2d at 1358. Moreover, the question, as framed by the Sixth Circuit, was not "whether Tennessee's liquor-pricing statute is likely to have 'repercussions' on liquor prices in other states, but whether Tennessee has actually undertaken to 'regulate' liquor prices in other states." *Id.* at 1359.

The Sixth Circuit answered that question in the negative. The court found that Tennessee's affirmation statute is "very different" from the New York law condemned in *Brown-Forman* in that a supplier may alter its prices, as it chooses, in wholesale liquor transactions in other states without first having to seek the approval of the Tennessee Alcoholic Beverage Commission. *Id.* Moreover, the Sixth

Circuit emphasized that under this Court's *Seagram* decision, which was not overruled in *Brown-Forman*, a state "may constitutionally insist that liquor prices to domestic wholesalers . . . be as low as prices offered elsewhere in the country.' " *Id.* at 1360, *quoting from Seagram*, 384 U.S. at 42-43. The Sixth Circuit held that this and nothing more "is what Tennessee has done in the statute before us." *Id.* In fact, the court concluded that § 57-3-202(e), on its face, "seems calculated to affect interstate commerce less drastically than the statute upheld in *Seagram*." *Id.* at 1361.

The Sixth Circuit noted the recent decision of the Second Circuit Court of Appeals in *The Beer Institute v. Healy*, 849 F.2d 753 (2nd Cir. 1988), *prob. juris. noted*, Nos. 88-449, 88-573 (U.S. Nov. 14, 1988) ("*Healy II*"), wherein the Second Circuit refused to " '*extend* the *Seagram* precedent'" to sustain Connecticut's beer price affirmation law. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1361, *quoting from Healy II*, 849 F.2d at 760-61. The Sixth Circuit found that § 57-3-202(e) contrasted with Connecticut's affirmation law in that it "exercises no control over out-of-state prices; it simply requires that a distiller set its Tennessee prices at the lowest levels it chooses to set in other states." 860 F.2d at 1361. Finally, the court concluded that Tennessee's affirmation law, on its face, operates even-handedly, and as such, is neither discriminatory nor protectionist. *Id.* at 1362-63.

REASONS FOR DENYING THE WRIT

I.

The Sixth Circuit's Decision That Tennessee's Affirmation Law Does Not Violate The Commerce Clause Is Consistent With The Principles And Reasoning Of This Court's Commerce Clause/ Twenty-first Amendment Decisions.

Tennessee's alcoholic beverage price affirmation law, Tenn. Code Ann. § 57-3-202(e), does not control prices in wholesale liquor transactions in other states, and thus, does not directly regulate interstate commerce. Both before and after a supplier of alcoholic beverages has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states. Tennessee's law does impose a general requirement of equally low prices at the time of sale to a Tennessee wholesaler. But if real competitive advantages are present, such as cost savings or quantity purchases, then lower prices to non-Tennessee wholesalers, even at the time of sale to Tennessee wholesalers, are both possible and permissible under Tennessee's law.

In *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 284 U.S. 35 (1966), this Court considered a facial Commerce Clause challenge to the State of New York's original liquor price affirmation statute. That law was "retrospective" in effect, requiring suppliers to affirm that their prices to New York wholesalers were no higher than their wholesale prices in other states during the month immediately preceeding the suppliers' sales in New York. In concluding that such a requirement did not run afoul of the dormant Commerce Clause, the Court stated that

"[t]he mere fact that [the statute] is geared to appellant's pricing policies in other states is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 42-43.

Twenty years later, in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), this Court struck down the New York liquor price affirmation statute then in effect, as a direct regulation of interstate commerce. The statute at issue in *Brown-Forman* was the successor to New York's original law addressing liquor price affirmation, the facial validity of which was upheld in *Seagram*. The *Seagram* decision was not overruled in *Brown-Forman*. *See* 476 U.S. at 584, n. 6.

The law struck down in *Brown-Forman* required all distillers of alcoholic beverages to post a price schedule, before the 25th day of each month, listing their wholesale prices in New York, to be effective the second following month. At the time the schedules were filed, the distillers were also required to file an affirmation that their posted prices for New York would be no higher than the lowest prices at which the distillers would sell liquor, during the effective month, to wholesalers in any other state. 476 U.S. at 575-76.

In analyzing the effect of these provisions on interstate commerce, this Court noted that the New York statute was not materially different from a Connecticut beer price affirmation statute struck down as a direct regulation of interstate commerce by the Second Circuit

Court of Appeals, and summarily affirmed by the Court, in *United States Brewers Association v. Healy*, 692 F.2d 275 (2nd Cir. 1982), *summarily aff'd*, 464 U.S. 909 (1983) (*Healy I*).[2] New York's law, like Connecticut's, was "prospective" in its operation. Once a supplier had posted its prices in New York, the supplier was not free to lower its prices in wholesale transactions in other states during the effective month. The only way in which the supplier could lower its prices in other states was with the approval of the New York State Liquor Authority. 476 U.S. at 581-82. As a result, New York's prospective affirmation statute operated to control prices set in wholesale transactions in other states in violation of the Commerce Clause. As held by this Court, "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582 (citations omitted).

Tennessee's affirmation statute, Tenn. Code Ann. § 57-3-202(e), is materially different from the prospective New York affirmation law struck down by the Court in *Brown-Forman*. Tennessee's affirmation statute is neither prospective nor retrospective in its operation, but rather

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[2] In addition to the decisions in *Seagram* and *Brown-Forman*, and the summary affirmance in *Healy I*, the jurisprudence of this Court in the area of price affirmation practices includes the Court's denial, in 1973 and again in 1985, of motions filed by the Commonwealth of Pennsylvania asking the court to exercise its original jurisdiction to hear Pennsylvania's complaint that all state liquor affirmation practices are unconstitutional. *See Commonwealth of Pennsylvania v. State of Alabama*, No. 101 Original (June 17, 1985); *Pennsylvania v. New York*, 410 U.S. 978, *reh. den.*, 411 U.S. 977 (1973). In both of these cases, the Court's decision was without opinion.

uses a "contemporaneous" time period as the reference point for the lowest or affirmed price. Under Tennessee's contemporaneous law, a supplier must affirm that its prices, at the time of its sale to a Tennessee wholesaler, are no higher than the supplier's prices elsewhere at that time.

Tennessee's contemporaneous statute focuses on present wholesale transactions, not future ones. *See Healy I*, 692 F.2d at 282 (Connecticut's prospective affirmation law "is geared to the future"). Both before and after a supplier has made its sale to a Tennessee wholesaler, the supplier is free to raise or lower its prices, as it chooses, in wholesale liquor transactions in other states. Unlike the New York law condemned in *Brown-Forman*, the supplier does not have to "seek the approval of the [Tennessee Alcoholic Beverage Commission] before it may lower its price for the same item in other States." *Brown-Forman*, 476 U.S. at 583.

Tennessee's affirmation law clearly falls within the ambit of permissable liquor regulation under Tennessee's Twenty-first Amendment powers, as defined by the *Seagram* decision. As the Court instructed in that case, a state "may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country." *Seagram*, 384 U.S. at 42-43. As the Sixth Circuit recognized, this is all that Tennessee's affirmation law requires. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1360. Whenever petitioner, or any other distiller deals with a Tennessee wholesaler, it must offer to that wholesaler a price not lower, but *equally* low to the price it is offering wholesalers in other states at that time. Tennessee's law certainly impacts interstate

commerce no more than the law sustained by this Court in *Seagram*.

In fact, the Sixth Circuit acknowledged that Tennessee's contemporaneous statute actually "seems calculated" to have less of an impact on interstate commerce than the statute upheld in *Seagram*. *Id.* at 1361. Whereas New York's retrospective law was geared to a supplier's wholesale liquor transactions in other states occurring throughout the month preceeding the supplier's sale to a New York wholesaler, § 57-3-202(e) is geared *only* to those transactions in other states occurring at the very time of a supplier's sale to a Tennessee wholesaler.

Moreover, whatever *de minimus* effects on interstate commerce may result from Tennessee's contemporaneous affirmation requirement, those effects are further mitigated by other aspects of Tennessee's alcoholic beverage laws. Tennessee does not require price posting, unlike New York, where price posting provisions were interrelated to the affirmation laws at issue in both *Seagram* and *Brown-Forman*. Tennessee's affirmation law is further distinguished from the New York statutes considered in those cases in its definition of the affirmed "price." Tenn. Code Ann. § 57-3-202(e)(3) defines "price" as the:

> Platform price at the distillery and shall not include price differentials based on transportation costs, containers or other costs not directly related to the quality and proof of the product concerned. Quantity discount prices for liquors sold to monopoly states or elsewhere shall not be considered to be violation of the manufacturer's, distiller's, rectifier's, factor's, broker's, or vintner's affirmation if such discount prices are also offered to Tennessee wholesalers for purchases in the same quantities.

Under Tennessee's statute, a supplier may charge a lower price in other states, even at the time of its sale to a Tennessee wholesaler, if such price results from differences in cost, or from discounts based upon quantity purchases.

The definition of "price" in Tennessee's affirmation law differs dramatically from the "price" definitions in the original New York affirmation law upheld in *Seagram*, and the successor affirmation law struck down in *Brown-Forman*. Both New York statutes required the lowest or affirmed "price" to reflect *all* discounts offered by a supplier to any out-of-state wholesalers. *Brown-Forman*, 476 U.S. at 577, n. 4; *Seagram*, 384 U.S. at 41; see also *Healy I*, 692 F.2d at 277. In fact, the *Brown-Forman* case began with an administrative action against the distiller, because Brown-Forman was prohibited from offering its 77-17 promotional allowance to wholesalers in New York, yet the definition of "price" in New York's affirmation law required that the 77-17 allowance offered by Brown-Forman to wholesalers in other states be reflected in the New York affirmed price. As this Court aptly observed:

> By defining the "effective price" of liquor differently from other States, New York can effectively force appellant to abandon its promotional allowance program in States in which that program is legal, or force those other States to alter their own regulatory schemes in order to permit appellant to lower its New York prices without violating the affirmation laws of those States. Thus New York has "project[ed] its legislation" into other states, and directly regulated commerce therein, in violation of *Seelig*, *supra*.

Id. at 2087 (footnote omitted).

As the foregoing illustrates, the Sixth Circuit correctly concluded that Tennessee's affirmation law does not operate, either on its face or in practical effect, to *control* prices in wholesale liquor transactions in other states, and as such, does not directly regulate interstate commerce. The Sixth Circuit was also correct in its conclusion that § 57-3-202(e) does not discriminate against interstate commerce.

As this Court noted in *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1648 (1987) (citations omitted), "[t]he principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." In this regard, Tennessee's statute operates even-handedly, neither favoring in-state suppliers such as petitioner, nor disfavoring suppliers out-of-state.[3] In *Brown-Forman*, this Court stated that, "[w]hile a State may seek low prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess. *Baldwin v.*

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[3] The Sixth Circuit noted that Tennessee's equally low price affirmation requirement may have the effect of increasing the cost of doing business for suppliers selling in Tennessee. *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1358-59. Although, as the court recognized, the record does not establish that Tennessee's statute has had that effect on petitioner's operations, even if § 57-3-202(e) does raise a supplier's cost of doing business in Tennessee by requiring equally low prices to domestic wholesalers, any increased costs impact even-handedly on both in-state and out-of-state suppliers. As a result, there is no discrimination against interstate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935); *Schwegmann Brothers Giant Super Markets v. Louisiana Milk Comm'n*, 365 F.Supp. 1144 (MD La. 1973), *aff'd*, 416 U.S. 922 (1976)." 476 U.S. at 580.

In challenging § 57-3-202(e), petitioner failed to present evidence identifying any real competitive advantages that either wholesalers or consumers in other states have been forced to surrender as a result of Tennessee's affirmation law. In the *Seelig* and *Schwegmann* cases cited by the Court, actual competitive advantages were present. In those cases, producers in other states were able to produce the items in question at a lower cost than producers in the regulating states, and because of this cost advantage, could sell the product more cheaply. *See Seelig*, 294 U.S. at 528; *Schwegmann*, 365 F.Supp. at 1153.

A lower price that is a result of savings in cost is a true competitive advantage, and one that is specifically preserved in Tennessee's affirmation law. Under § 57-3-202(e)(3), price variations based on differences in cost are an express exception to Tennessee's requirement of an equally low price for its wholesalers. Thus, if it costs petitioner, or any other distiller, less to sell to wholesalers in other states than to wholesalers in Tennessee, such a cost savings may be reflected by a lower price to the out-of-state wholesalers without violating Tennessee's law.

II.

The Sixth Circuit's Decision That Tennessee's Affirmation Law Does Not Contravene The Commerce Clause Is Not In Conflict With The Second Circuit's Decision In *Healy II*.

On March 28, 1989, this Court will hear oral argument on the constitutionality of the State of Connecticut's beer price affirmation statute in *The Beer Institute v. Healy*, 849 F.2d 757 (2nd Cir. 1988), *prob. juris. noted*, Nos. 88-449, 88-513 (U.S. Nov. 14, 1988) ("*Healy II*"). Should this Court decide not to deny Brown-Forman's petition for a writ of certiorari, the Court's consideration of the issues raised by *Healy II* should not summarily preclude consideration of the issues presented by this case regarding Tennessee's affirmation statute.

The Sixth Circuit's decision to uphold Tennessee's affirmation statute does not conflict with the Second Circuit's decision to strike down Connecticut's affirmation law. In sustaining § 57-3-202(e), the Sixth Circuit relied upon this Court's *Seagram* decision. In fact, the appeals court recognized that Tennessee's affirmation law seemed "to affect interstate commerce less drastically than the statute that was upheld in *Seagram*." *Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d at 1361; *see also* 860 F.2d at 1360 ("The New York statute [in *Seagram*] was thus more restrictive than the Tennessee statute"). In ruling on Tennessee's affirmation statute, the Sixth Circuit reviewed the Second Circuit's *Healy I* and *Healy II* decisions. The court concluded that § 57-3-202(e) contrasted with Connecticut's affirmation law, because it does not control out-of-state prices, and requires at most that a supplier set its

Tennessee prices at the lowest level it chooses to set in other states. *Id.* at 1361.

The Second Circuit, in concluding that Connecticut's affirmation law violated the Commerce Clause, did not ignore the *Seagram* decision. To the contrary, the Second Circuit held that it was declining to "*extend* the *Seagram* precedent to validate a simultaneous affirmation provision that by its purposeful interaction with border state regulatory schemes, operates to control prices beyond its borders." *Healy II*, 849 F.2d at 760-61 (emphasis in original). The Second Circuit did not reject its earlier statement from its *Healy I* decision regarding *Seagram*, whereby the court had stated, *in dicta*, that *Seagram* "might well validate" affirmation regulation which required " 'simply that a brewer set its Connecticut prices at the lowest level it chooses to set in surrounding states.' " *Id.* at 760, *quoting from United States Brewers Ass'n v. Healy*, 692 F.2d 275, 283-84 (2nd Cir. 1982) (*Healy I*).

The Second Circuit concluded that Connecticut's affirmation provisions regulated beer prices outside the state in two ways. First, Connecticut had specifically chosen to regulate beer prices "*in reference to* the regulated prices in the border states. . . ." *Healy II*, 849 F.2d at 758 (emphasis in original). The "purposeful interaction" between the price posting/price regulation laws of the border states with Connecticut's price affirmation/price posting provisions operated to set beer prices in the border states. *Id.* at 760-61. Second, Connecticut's affirmation law also regulated beer prices outside Connecticut by effectively preventing the brewers' use of volume discounts to wholesalers. Connecticut's affirmation law defined the affirmed price to include volume discounts

offered to wholesalers in other states. However, Connecticut prohibited brewers from offering volume discounts to its wholesalers. The effect of this was to restrict a brewer's ability to offer volume discounts to wholesalers in the border states as such discounts would have to be reflected in the Connecticut affirmed price, even though such discounts could not be offered in that state. *Healy II*, 849 F.2d at 760. By defining the affirmed price in this way, Connecticut's affirmation law has the same effect as the New York law condemned in *Brown-Forman*, which defined the affirmed price to include the 77-17 promotional allowance Brown-Forman offered to wholesalers outside of New York, but which could not be offered to New York wholesalers. *See Brown-Forman*, 476 U.S. at 583-84.

In contrast, Tennessee's affirmation law does not operate in connection with any price posting provisions; Tennessee has none. Tennessee's affirmation statute, unlike Connecticut's, is not designed to "purposefully interact" with the liquor regulatory laws of any state. Quite simply, all Tennessee's affirmation law requires is that whenever petitioner, or any other distiller, deals with a Tennessee wholesaler, it must offer to that wholesaler a "platform price" not lower, but equally low to the platform price it is offering wholesalers in other states at that time. Moreover, Tennessee's law, differing from the Connecticut law struck down in *Healy II*, does not restrict a supplier's ability to vary its price through offers of volume discounts to wholesalers outside of Tennessee. In fact, Tennesseee has specifically defined the affirmed price to exclude any price differentials resulting from equally offered discounts for quantity purchases. As a

result, a supplier may charge a lower price in other states, even at the time of its sale to a Tennessee wholesaler, if such price results from discounts based upon quantity purchases.

III.

The Basic Principle Of *Seagram* That A State Exercising Its Twenty-first Amendment Powers May Constitutionally Insist On Equally Low Liquor Prices Should Be Reaffirmed By Denying The Writ.

Brown-Forman, in its petition for a writ of certiorari, asserts that the Sixth Circuit's decision sustaining Tennessee's affirmation statute highlights the need for the Court to address the current viability or applicability of the *Seagram* decision. The basic principle of *Seagram*, that a state, in the exercise of its Twenty-first Amendment powers, "may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country" should be reaffirmed by this Court. *See Seagram*, 384 U.S. at 42-43. As the Sixth Circuit aptly noted, "[w]hatever the effect on interstate commerce of a state statute prohibiting sales of liquor at discriminatory prices, it could hardly be more direct or profound than the effect of prohibiting sales of liquor altogether." *Tennessee Alcoholic Beverage Comm'n.*, 860 F.2d at 1357.

If the basic principle of *Seagram* is not sustained, and the Court should rule that all affirmation statutes impermissibly interfere with interstate commerce in violation of the Commerce Clause, such a decision would impact inequitably upon the states. Such a decision would not inhibit the monopoly or control states' use of the "Des

Moines Warranty" affirmation provisions in their contracts with suppliers.

Where a state is a participant in a market, rather than a regulator thereof, this Court has held that it is not subject to the dormant or negative aspect of the Commerce Clause. *See South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (Opinion of White, J.); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 206-08 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-10 (1976). It seems obvious that the control states, as wholesale purchasers of alcoholic beverages, are participants in that market. Under the "market participant" doctrine, the price affirmation provisions imposed by the control states in their purchase contracts with liquor suppliers would be exempt from scrutiny under the Commerce Clause, and thus, would be unaffected by a decision to overrule *Seagram*.

The basic principle of *Seagram* that a state, in exercising its Twenty-first Amendment powers, may constitutionally insist on equally low liquor prices should be reaffirmed by the Court by denying petitioner a writ of certiorari. If the Court should conclude, however, that a reexamination of *Seagram* specifically, and of affirmation laws generally, is needed, then as the Sixth Circuit noted, this would "be a good case in which to do it," because Tennessee's affirmation statute "seems calculated to affect interstate commerce less drastically than the statute that was upheld in *Seagram*." *Tennessee Alcoholic Beverage Comm'n*, 860 F.2d at 1361.

CONCLUSION

For these reasons, the Commission respectfully requests that Brown-Forman's petition for a writ of certiorari be denied.

Respectfully submitted,

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